DOCKET

SUPREME COURT

OF THE UNITED STATES

No. 10-224

Title: National Meat Association, Petitioner
v.
Kamala D. Harris, Attorney General of California, et al.

Docketed: August 17, 2010

Lower Ct: United States Court of Appeals for the Ninth Circuit

Case Nos.: (09-15483, 09-15486)

Decision Date: March 31, 2010

Rehearing Denied: May 18, 2010

Questions Presented:

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Aug 13 2010	Petition for a writ of certiorari filed. (Response due September 16, 2010)
Aug 31 2010	Waiver of right of respondents Arnold Schwarzenegger, Governor, et al., to respond filed.
Aug 31 2010	Waiver of right of respondents The Humane Society of the United States, et al., to respond filed.
Sep 10 2010	Motion for leave to file amicus brief filed by American Association of Swine Veterinarians, et al.
Sep 29 2010	DISTRIBUTED for Conference of October 15, 2010.
Oct 13 2010	Response Requested. (Due November 12, 2010)
Oct 27 2010	Order extending time to file response to petition to and including December 15, 2010, for all respondents.
Dec 15 2010	Brief of respondents Humane Society of the Unite States, et al., in opposition filed.
Dec 15 2010	Brief of respondents Arnold Schwarzenegger, Governor, et al., in opposition filed.
Dec 23 2010	Reply of petitioner National Meat Association filed.
Dec 29 2010	DISTRIBUTED for Conference of January 14, 2011.
Jan 18 2011	The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 26 2011	Brief amicus curiae of United States filed.
Jun 6 2011	Supplemental brief of petitioner National Meat Association filed.
Jun 7 2011	DISTRIBUTED for Conference of June 23, 2011.
Jun 27 2011	Motion for leave to file amici brief filed by American Association of Swine Veterinarians et al. GRANTED.
Jun 27 2011	Petition GRANTED.
Jul 20 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 22, 2011.

Jul 20 2011	The time to file respondents' briefs on the merits is extended to and including October 3 2011
Aug 8 2011	SET FOR ARGUMENT ON Wednesday November 9 2011
Aug 15 2011	Record received from U S C A for 9th Circuit (1 envelope)
Aug 15 2011	Record from U S D C for Eastern District of California is electronic
Aug 22 2011	Joint appendix filed (Statement of costs filed)
Aug 22 2011	Brief of petitioner National Meat Association filed
Aug 29 2011	Brief amicus curiae of United States filed
Aug 29 2011	Brief amicus curiae of Chamber of Commerce of the United States of America filed
Aug 29 2011	Brief amici curiae of American Association of Swine Veterinarians et al filed
Sep 14 2011	CIRCULATED
Sep 26 2011	Motion for divided argument filed by respondents The Humane Society of the United States et al
Oct 3 2011	Brief of respondents The Humane Society of the United States et al filed (Distributed)
Oct 3 2011	Brief of respondents Kamala D Harris Attorney General of California et al filed (Distributed)
Oct 6 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed
Oct 10 2011	Brief amicus curiae of American Society for the Prevention of Cruelty to Animals filed (Distributed)
Oct 10 2011	Brief amici curiae of Public Citizen, et al filed (Distributed)
Oct 11 2011	Brief amici curiae of Illinois et al filed (Distributed)
Oct 11 2011	Brief amici curiae of Professors of Preemption Law filed (Distributed)
Oct 11 2011	Brief amici curiae of Tim Blackwell D V M and Kristie Mozzachio D V M filed (Distributed)
Oct 28 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED
Oct 28 2011	Motion for divided argument filed by The Humane Society of the United States et al DENIED
Nov 2 2011	Reply of petitioner National Meat Association filed (Distributed)
Nov 9 2011	Argued For petitioner Steven J Wells Minneapolis Minn and Benjamin J Horwich Assistant to the Solicitor General Department of Justice Washington D C (for United States as amicus curiae) For respondents Susan K Smith Deputy Attorney General Los Angeles Cal

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 10-224

AUG 13 2010

OFFICE OF THE CLERK

In The
Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

EDMUND G. BROWN JR., in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA; THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Meat Inspection Act ("FMIA"), as amended by the Wholesome Meat Act of 1967 and the Humane Methods of Slaughter Act, comprehensively regulates the "premises, facilities, and operations" of slaughterhouses where meat is prepared for human consumption. Since the passage of the Wholesome Meat Act, the FMIA has expressly preempted state regulations "in addition to, or different than" federal regulations. 21 U.S.C. § 678. Thus, for almost half a century, a uniform federal regulatory framework has safeguarded animal and human health and safety. In 2008, California passed a law – the provisions of which were later considered and expressly rejected by federal regulators – requiring federally-inspected slaughterhouses to "immediately euthanize" any non-ambulatory animal on its premises, thereby eliminating important federally-required ante-mortem inspection of possibly diseased animals.

The questions presented in this case are:

1. Did the Ninth Circuit err in holding that a "presumption against preemption" requires a "narrow interpretation" of the FMIA's express preemption provision, in conflict with this Court's decision in *Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977), that the provision must be given "a broad meaning"?

2. Where federal food safety and humane handling regulations specify that animals (here, swine) which

QUESTIONS PRESENTED – Continued

are or become nonambulatory on federally-inspected premises are to be separated and held for observation and further disease inspection, did the Ninth Circuit err in holding that a state criminal law which requires that such animals *not* be held for observation and disease inspection, but instead be immediately euthanized, was not preempted by the FMIA?

3. Did the Ninth Circuit err in holding more generally that a state criminal law which states that no slaughterhouse may buy, sell, receive, process, butcher, or hold a nonambulatory animal is not a preempted attempt to regulate the "premises, facilities, [or] operations" of federally-regulated slaughterhouses?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The petitioner is the National Meat Association ("NMA"), a nonprofit organization whose members are meat packers and processors, equipment manufacturers and suppliers throughout the United States and other countries. NMA, Frequently Asked Questions, http://nmaonline.org/about/faqs (last visited Aug. 10, 2010). NMA brought suit against Respondents Edmund G. Brown Jr., in his official capacity as Attorney General of California; Arnold Schwarzenegger, in his official capacity as Governor of California; and the State of California, seeking preliminary and permanent injunctive relief and a declaration barring the application of Cal. Penal Code § 599f to federally-inspected swine slaughterhouses in the State. The Humane Society of the United States, Farm Sanctuary, Inc., Humane Farming Association, and Animal Legal Defense Fund, were permitted to intervene as defendants and are Respondents to this Petition. The American Meat Institute also intervened, as a plaintiff seeking only permanent injunctive relief with respect to all other livestock governed by Section 599f, and thus was not a party to the preliminary injunction hearing or the appeal to the Ninth Circuit, and is not a party to this Petition.

Pursuant to Supreme Court Rule 29.6, undersigned counsel state that NMA is an association, not a nongovernmental corporation, and therefore is not required to file a Corporate Disclosure Statement pursuant to Sup. Ct. R. 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner National Meat Association ("NMA") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court's opinion is unreported. Pet. App. 18a. The Ninth Circuit's opinion is reported at 599 F.3d 1093, and reproduced at Pet. App. 1a. The order denying the petition for rehearing and rehearing *en banc* is unreported. Pet. App. 57a. The Ninth Circuit's order staying the mandate pending this petition for certiorari is also unreported. Pet. App 54a.

JURISDICTION

The Ninth Circuit filed its opinion on March 31, 2010. Pet. App. 2a. That court denied Petitioner's timely petition for rehearing and rehearing *en banc* on May 18, 2010. Pet. App. 57a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Federal Meat Inspection Act, its implementing regulations, and California Penal Code § 599f are set forth in the appendix.

STATEMENT OF THE CASE

Section 408 of the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 678, prohibits states from imposing "[r]equirements . . . with respect to premises, facilities and operations of any [federally-inspected slaughterhouse] establishment . . . which are in addition to, or different than those made under" the Act. Just as this Court held when previously interpreting this section, "[t]his explicit preemption provision dictates the result in th[is] controversy." *Jones v. Rath Packing Co.*, 430 U.S. 519, 530-31 (1977).

Congress passed the first federal Meat Inspection Act in 1906 to comprehensively regulate slaughterhouse operations in interstate and foreign commerce. 34 Stat. 674 (1906); *see also* 34 Stat. 1260 (1907). Sixty years after its initial passage, the Wholesome Meat Act of 1967 substantially amended the Federal Meat Inspection Act to close a remaining "gap" – intrastate "meat that received no Federal inspection" but instead was subject to disparate state inspections, thus "risking the health of our children and of our

families." Lyndon B. Johnson, Remarks Upon Signing Bill Amending the Meat Inspection Act, 2 PUB. PAPERS 541 (Dec. 15, 1967) (signing Pub. L. 90-201, 81 Stat. 584 into law). To ensure that federal law sets the sole standard for animal health and disease inspection at federally-inspected facilities, the Wholesome Meat Act included the express preemption provision at issue in this suit. 21 U.S.C. § 678.

The FMIA, in its current form, regulates all aspects of federally-inspected slaughterhouse operations. All livestock on such premises are subject to the FMIA's requirements for humane handling, *see generally* 21 U.S.C. § 603(b), and pre- and post-slaughter inspection in order to detect any disease or adulteration rendering the meat unfit for human consumption, *see* 21 U.S.C. § 603(a) (ante-mortem), 21 U.S.C. § 604 (post-mortem), or that may trigger segregation or quarantine of the livestock and notification of higher officials, *see, e.g.*, 9 C.F.R. §§ 309.5, 309.15. As relevant here, these humane handling and inspection requirements include regulations that specifically govern swine that are or become non-ambulatory (unable to rise and walk) while on slaughterhouse grounds, whereby such animals are to be separated, 9 C.F.R. § 313.2(d)(1), and held for ante-mortem (pre-slaughter) inspection, 9 C.F.R. § 313.1(c), after which they may then be passed for slaughter and human consumption, 9 C.F.R. §§ 309.2(b), 311.1(a) – as most are – or classified as condemned, 9 C.F.R. §§ 309.2(b), 309.3, and humanely euthanized, 9 C.F.R. § 309.13(a), Part 313.

California, however, has upset this uniform federal process. By amending California Penal Code § 599f, California, which does not have its own independent state inspection program,[1] now requires that all nonambulatory livestock, including those on federally-inspected slaughterhouse grounds, must be *immediately euthanized* (and barred from human consumption), rather than set aside and held for ante-mortem inspection by federal inspectors. Cal. Penal Code §§ 599f(b)&(c). California's new law thus prohibits federal veterinarians and the inspectors they supervise from conducting the FMIA's required systematic ante-mortem inspection of nonambulatory animals on federally-inspected premises – the primary process by which serious communicable diseases are first detected. In addition, the California law criminalizes the conduct of slaughterhouse employees who attempt to follow the FMIA's requirements (or the direction of inspectors pursuant to the FMIA) with respect to the inspection and handling of nonambulatory swine, thus ensuring that the California law will supplant federal regulations in this area. Cal. Penal Code § 599f(h).

As the district court properly held, California's law is clearly preempted under the plain and explicit preemption provision of 21 U.S.C. § 678: the State's

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[1] *See* FSIS, Listing of States Without Inspection Programs, *available at* http://www.fsis.usda.gov/regulations_&_policies/Listing_of_States_Without_Inspection_Programs/index.asp (last visited Aug. 10, 2010).

requirement of immediate euthanization is "different than" the FMIA's requirements for observation and inspection before further processing. Indeed, the federal government, in amending its regulations in 2009, expressly considered and *rejected* adoption of the very requirements that are now California law.

This conflict between federal and state regulations concerning nonambulatory swine is thus both square and considered. The Ninth Circuit, however, held that the "presumption against preemption," as discussed in *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 n.3 (2009), mandated "a narrow interpretation" of the FMIA's express preemption provision, Pet. App. 7a-8a, without ever analyzing or even mentioning this Court's interpretation of that same provision in *Rath Packing*. This resulted in the Ninth Circuit "twist[ing] the [statute's] language beyond the breaking point," *Rath Packing*, 430 U.S. at 532, by holding that, notwithstanding the federal government's express consideration and rejection of the California requirements, Section 599f(a)-(c) were not regulations of the "premises, facilities and operations" of slaughterhouses, and thus were not preempted.

The Ninth Circuit's decision directly contravenes this Court's precedent in *Rath Packing*, which explicitly rejected ascribing such "restrictive meaning[s]" to the FMIA's preemption clause. 430 U.S. at 532. Unfortunately, the Ninth Circuit's flawed invocation of the presumption against preemption is a byproduct of what another circuit has recently described as the "ongoing disagreement among Supreme Court jurists

as to if, when, and how this presumption applies." *Demahy v. Actavis, Inc.*, 593 F.3d 428, 434 (5th Cir. 2010), *petition for cert. filed*, No. 09-1501 (Jun. 7, 2010). Certiorari is necessary to bring the California law (and the Ninth Circuit) into line with *Rath Packing* and Congress's preemptive intent for the FMIA, and to bring clarity to the lower courts' confusion as to the presumption's role in interpreting express preemption provisions. Such action is all the more important given the public health concerns implicated by the California law.

A. The Federal Meat Inspection Act

In 1906, Congress acted in direct response to the unsanitary conditions of the Chicago meat packing industry documented in Upton Sinclair's *The Jungle* by passing the first Meat Inspection Act. *See generally* FSIS, *Celebrating 100 Years of FMIA*, *available at* http://www.fsis.usda.gov/About_FSIS/100_Years_FMIA/index.asp (May 15, 2006) (last visited Aug. 10, 2010); *see* 34 Stat. 674 (1906); 34 Stat. 1260 (1907). Since the FMIA's enactment, federal law has comprehensively and uniformly governed the interstate meat industry. As the Act's name implies, inspection has always been a core component of the FMIA. This Court recognized early on that one of the "plain object[s]" of the FMIA has been to "enable the officials of the Government to systematize and render effective the processes of inspection," *United States v. Lewis*, 235 U.S. 282, 286-87 (1914), and from its inception the FMIA has "provide[d] an elaborate

system of inspection of animals before slaughter, and of carcasses after slaughter and of meat-food products, with a view to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products in interstate and foreign commerce," *Pittsburgh Melting Co. v. Totten*, 248 U.S. 1, 4 (1918). *See* 21 U.S.C. § 602.

In 1967, Congress amended the FMIA by passing the Wholesome Meat Act, Pub. L. 90-201, 81 Stat. 584, in response to an exposé documenting "shocking abuses in some segments of the non-[federally]-regulated meat industry." Nick Kotz, *Ask Tighter Law on Meat Inspections for Products Sold Within States*, Des Moines Sunday Register, Jul. 16, 1967, at p. 1, 4. The 1967 law was directly aimed at Congress's recognition that "*Federal* standards must be required of all meat and meat food products," unlike the disparate, or non-existent state inspection schemes then governing the intrastate meat industry. Senate Committee on Agriculture and Forestry, Wholesome Meat Act of 1967, S. Rep. No. 799 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 2188, 2190-91 (emphasis added). Accordingly, the Act created a program, under Title III, for "Federal and State Cooperation," to enact requirements for intrastate slaughtering operations "at least equal to those" applicable to federally-inspected slaughterhouses under Title I of the Act. Section 15, 81 Stat. at 595-97 (codified at 21 U.S.C. § 661). The 1967 Act simultaneously tightened federal standards over those interstate slaughterhouses

already subject to federal inspection under Title I by making ante-mortem inspection of livestock to be slaughtered for meat mandatory,[2] and by making expressly clear that federal law provides the sole standards for those slaughterhouses' operations, 21 U.S.C. § 678 (Section 408 of the 1967 Act).

With respect to this preemption provision, Congress clearly set forth its intent that federal requirements exclusively govern federally-inspected slaughterhouses by providing, in relevant part, that:

> *Requirements* within the scope of this chapter *with respect to premises, facilities and operations* of any establishment at which inspection is provided under subchapter I of this chapter, *which are in addition to, or different than those made under this chapter may not be imposed by any State*. . . .

21 U.S.C. § 678 (emphasis added).[3] Consistent with the 1967 Act's intent to create complete uniformity of inspection, "Section 408 [the express preemption provision] would exclude States . . . from regulating operations at plants inspected under title I." House

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[2] The Wholesome Meat Act eliminated the Secretary's ability to act "at his discretion," instead requiring that "the Secretary *shall* cause to be made, by inspectors appointed for that purpose, an examination and inspection of all amenable species. . . ." 21 U.S.C. § 603(a) (as amended by Section 3, 81 Stat. at 588) (emphasis added).

[3] Section 678 is reproduced in its entirety in Appendix E. Pet. App. 63a.

Committee on Agriculture, Wholesome Meat Act of 1967, H.R. Rep. No. 653, at 27 (1967); Senate Committee on Agriculture and Forestry, Wholesome Meat Act of 1967, S. Rep. No. 799 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 2188, 2207 (same); *see also* H.R. Rep. No. 653, at 7 ("States would be prohibited from regulating federally inspected plants whose operations are governed by title I."). This standard is reinforced by the clause's further provision that, where states wish to pass requirements or take other actions regarding "any other matters regulated under this chapter" not covered by the express preemption clause, they must still be "consistent with" federal requirements. 21 U.S.C. § 678.

The FMIA, as amended by the 1967 Act, mandates federal ante-mortem inspection of livestock before slaughter for meat. 21 U.S.C. § 603(a). It also regulates all other federally-inspected slaughterhouse operations, under comprehensive federal regulations administered by the Food Safety and Inspection Service ("FSIS").[4] For example, in 1978, Congress amended the FMIA by passing the Humane Methods of Slaughter Act to ensure that all livestock on slaughterhouse grounds be handled and slaughtered "in accordance with humane methods." Pub. L. No.

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[4] FSIS's regulatory authority pursuant to the FMIA is not in dispute in this case, and it is agreed that the regulations promulgated pursuant to the Act bear the same preemptive force as the statute itself. *See Rath Packing*, 430 U.S. at 522-32 (considering federal regulations in preemption analysis).

95-445; 92 Stat. 1069 (1978). Similarly, the FMIA also regulates marking, labeling, packaging, and ingredient requirements both within and beyond the slaughterhouses' walls, as this Court addressed in *Rath Packing*.

This suit involves the inspection of livestock, specifically swine, that are or become nonambulatory[5] while on federally-inspected slaughterhouse grounds. Federal regulations require that such "downer" livestock, other than cattle,[6] that are "disabled" or "unable to move" be separated, 9 C.F.R. § 313.2(d)(1), and taken to a covered pen and held for further inspection

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[5] The federal regulations define "non-ambulatory disabled livestock" as "livestock that cannot rise from a recumbent position or that cannot walk, including, but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column, or metabolic conditions." 9 C.F.R. § 309.2(b).

[6] Nonambulatory cattle are subject to different federal regulations because a cow's inability to walk is one symptom of bovine spongiform encephalopathy, commonly referred to as BSE or "mad cow disease," making the meat from that animal unsafe for human consumption. Such dangers, however, do not present themselves in pigs. *See* Court of Appeals Excerpts of Record (*hereinafter* "C.A.App.") 882 (Masters Decl.¶¶ 4-5). Indeed, there is no evidence that the consumption of meat or meat products from nonambulatory swine at a federally-inspected facility has ever caused or even poses a risk of causing a human health concern. C.A.App. 135-39 (Masters Suppl. Decl. ¶¶ 2-10). Rather, pigs that are nonambulatory upon arrival at federally-inspected slaughterhouses, or become so while kept in a holding pen, are often merely fatigued, stubborn, over-heated, or stressed, and in many cases are able to stand and walk after rest and supervision. C.A.App. 885, 886 (Terrill Decl. ¶¶ 5, 8).

by federally-regulated inspectors, 9 C.F.R. § 313.1(c), where they will either be identified as U.S. Suspects, 9 C.F.R. § 309.2(b), and passed for slaughter and human consumption if found to be safe, 9 C.F.R. § 311.1(a), or otherwise classed as condemned, 9 C.F.R. §§ 309.2(b), 309.3, and humanely euthanized, 9 C.F.R. § 309.13(a), Part 313. Moreover, because federal regulations attach as soon as a vehicle enters slaughterhouse premises, 9 C.F.R. § 302.3, if livestock are discovered to be nonambulatory upon arrival, federal inspection personnel may instead enter the transport vehicle itself and perform ante-mortem inspection there. FSIS Directive 6900.1, Rev. 1, Part One (III), (VI)(B), *available at* http://www.fsis.usda.gov/OPPDE/rdad/FSISDirectives/6900.1Rev1.pdf (last visited Aug. 10, 2010).

This systematic ante-mortem inspection required under the FMIA serves a critical role in animal disease control, whereby early onsite detection of certain serious communicable diseases by federal veterinarians (or the inspectors they supervise) triggers such emergency measures as segregation or quarantine of the entire lot of livestock and notification of higher officials. *See, e.g.*, 9 C.F.R. § 309.5 (swine with hog cholera); 9 C.F.R. § 309.15 (vesicular disease); FSIS Directive 6000.1, Rev. 1, Part VI & VII, *available at* http://www.fsis.usda.gov/OPPDE/

rdad/FSISDirectives/6000.1Rev1.pdf (last visited Aug 10, 2010).[7]

B. California's Regulation of Federally-Inspected Slaughterhouses

In 2008, the State of California amended California Penal Code § 599f so as to supersede federal regulations concerning the handling and slaughter of nonambulatory livestock on federally-inspected slaughterhouse grounds. In response to an incident involving the abuse of nonambulatory *cattle* at a federally-inspected slaughterhouse in California, the state enacted an amendment to apply to *all* livestock because, according to the bill's primary sponsor, "California cannot allow unscrupulous slaughterhouse operators to endanger the safety of America's food supply and engage in grotesquely cruel practices." Assemblymember Paul Krekorian, *Krekorian Bill*

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[7] This directive specifically addresses the responsibilities Public Health Veterinarians (PHVs) at federally-inspected slaughterhouses have with respect to foreign animal diseases (FADs). FSIS Directive 6000.1, Rev. 1, at Part I. "If inspection program personnel observe" certain "signs or symptoms," including "sudden lameness" ante-mortem, "an FAD should be considered." *Id.* at Part VI. PHVs are then instructed "to consider animals that are exhibiting these signs or symptoms . . . as 'U.S. Suspects' or 'U.S. Condemned' as appropriate under the meat . . . regulations[;] . . . notify the DO [District Office] as soon as possible when they suspect that any undiagnosed or unusual disease condition is reportable, foreign, or both . . . [; and] provide [certain specified] information, if available, to the DO." *Id.* at Part VII.

to Protect Meat Safety Signed Into Law by Governor, Press Release (Jul. 24, 2008) (C.A.App. 289). The resulting law barred all slaughterhouses from receiving, processing, butchering, or selling the meat of nonambulatory livestock of any kind for human consumption, and criminalized the holding of any animal which is or becomes nonambulatory without immediately euthanizing it. Cal. Penal Code §§ 599f(a)-(c), (h).[8]

Nonambulatory pigs that are immediately euthanized by slaughterhouse employees, as required by section 599f(c), cannot be "separated," and held for "disposition by [federal] inspector[s]," as required under 9 C.F.R. §§ 313.2(d)(1),and 313.1(c), to determine whether they are truly sick, whether any sickness is communicable to other animals or humans, and what actions (such as herd quarantine) are to be taken to contain any communicable disease. Thus, Section 599f eliminates the systematic ante-mortem inspection by federal veterinarians of nonambulatory animals required by the FMIA, greatly increasing the risk that serious communicable diseases will not be timely detected or addressed.

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[8] California Penal Code § 599f, as amended, is set forth in its entirety at Appendix G. Pet. App. 72a.

C. The Federal Government's Express Rejection of California's Requirements

FSIS conducted its own review of the events at the cattle slaughterhouse in question, which "highlighted a vulnerability in [the federal] inspection system and . . . disclosed instances where cattle had been inhumanely handled." Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-Mortem Inspection, 74 Fed. Reg. 11463, 11463 (Mar. 18, 2009). Accordingly, after careful consideration, FSIS determined a targeted response was appropriate, issuing a proposed rule banning only the slaughter of nonambulatory cattle for human consumption.[9] FSIS expressly considered the requirements encapsulated in California's amended law and specifically rejected "extend[ing] the ban to cover all [nonambulatory] livestock," or "recommend[ing] that non-ambulatory disabled cattle be immediately euthanized" without further observation and inspection. *Id.* at 11464.

D. Proceedings Below

After the California legislature amended Section 599f but before that law went into effect, NMA filed suit against the California Attorney General, the

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[9] As the record reflects, the federal government limited its response to nonambulatory cattle for good reason, since there is no record evidence of similar human health concerns with respect to nonambulatory swine. *See supra*, note 6.

Governor of California, and the State of California in the United States District Court for the Eastern District of California, seeking preliminary and permanent injunctive relief and a declaration barring the application of Section 599f, as amended, to federally-inspected swine slaughterhouses in the State of California on preemption, vagueness, and commerce clause grounds. Soon after NMA brought suit, other parties intervened in the action. The American Meat Institute intervened as a plaintiff, raising similar claims to NMA's but with respect to all livestock (not just swine), and pursuing only permanent, and not preliminary, injunctive relief. Additionally, the Humane Society of the United States and other interest groups intervened as defendants.

On February 19, 2009, the district court granted NMA's Motion for Preliminary Injunction, on the basis that the FMIA preempted Section 599f.[10] The court observed that "Section 599f alters the process and methods for the receipt of animals, the determination of the animal as 'disabled' or 'nonambulatory,' and also alters the subsequent handling of the nonambulatory animal," and as such, "impermissibly 'differs from' and is [in] 'addition to' the FMIA," in contravention of the Act's express preemption clause. Pet. App. 36a-37a, 40a.

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[10] NMA's other constitutional claims were not addressed by the district court, and as the Ninth Circuit observed, "[t]he district court didn't reach the dormant commerce clause and vagueness claims. Neither do we." Pet. App. 6a n.2.

On appeal, the Ninth Circuit vacated the injunction. In doing so, it departed from its own precedent as well as that of both this Court and the Sixth Circuit, which had held that Congress had "unmistakably ordained" the preemption of state law by the FMIA, which was not to be confined to a "restrictive meaning." *See Rath Packing*, *supra*, 430 U.S. at 525, 532, *affirming Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1976); *Armour & Co. v. Ball*, 468 F.2d 76, 83-84 (6th Cir. 1972). Without mention or analysis of such precedent, the Ninth Circuit held instead that this Court's decision in *Wyeth, supra*, mandated the invocation of a "presumption against preemption," requiring the court to give a "narrow interpretation" to the FMIA's express preemption language. Pet. App. 7a-8a.

Applying this "narrow interpretation," the Ninth Circuit held that Section 599f(a)-(c) was not expressly preempted, Pet. App. 7a-11a, doing so as a matter of law, *id.* at 11a ("There is no express preemption here."), on the basis that: "Section 678 preempts state regulation of the 'premises, facilities and operations' of slaughterhouses, and Section 599f(a)-(c) deals with none of these." *Id.* at 9a. Instead, the court reasoned that the California law permissibly "regulates the *kind of animal* that may be slaughtered," *id.* (emphasis added), drawing upon two recent decisions from the Fifth and Seventh Circuits holding that state bans on the sale of horsemeat for human consumption are not preempted because the FMIA "in no way limits states in their ability to regulate what *types of*

meat may be sold for human consumption in the first place." *Id.* (citing *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 2950 (2008), and *Empacadora de Carnes de Fresnillo v. Curry*, 476 F.3d 326 (5th Cir. 2007), *cert. denied*, 550 U.S. 957 (2007); quoting *Empacadora*, 476 F.3d at 333) (emphasis added). While the district court found those cases non-dispositive, because "[a] nonambulatory pig is not a 'type of meat,'" Pet. App. 39a, the Ninth Circuit dismissed the district court's reasoning as "hogwash," Pet. App. 10a. Instead, the Ninth Circuit recast the Fifth and Seventh Circuits' "type of meat" distinction, which permitted states simply to prohibit a certain species of livestock from ever entering federally-inspected slaughterhouse grounds for slaughter, into one countenancing state regulation of the "kind of animal" to be slaughtered, and then, unlike the horsemeat laws, allowed the state to regulate which *individual* animals (of a kind – here, pigs – otherwise permissible for slaughter under state law) may be slaughtered based upon a mutable characteristic (nonambulation) often exhibiting itself only after that particular animal is already on federally-inspected premises. The Ninth Circuit made no reference to the federal government's explicit rejection of the very requirements enacted by California, instead concluding: "California's prohibition on the slaughter of nonambulatory animals does not duplicate federal procedures; it withdraws from slaughter animals that are unable to walk to their death. This prohibition doesn't require *any* additional or different inspection than does the FMIA, and is

thus not a regulation of the 'premises, facilities and operations' of slaughterhouses." Pet. App. 11a (emphasis in original).[11]

While the Ninth Circuit vacated the preliminary injunction and denied rehearing of its decision, it did grant NMA's motion to stay the mandate pending certiorari. Thus, notwithstanding its holding on the merits, the Ninth Circuit has temporarily maintained the status quo – the supremacy of federal law regarding federally-inspected slaughterhouses – while NMA petitions this Court to review the Ninth Circuit's ruling on the FMIA express preemption claim.

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[11] In contrast, the Ninth Circuit did find that Cal. Penal Code § 599f(e), which prohibits slaughterhouses from dragging or pushing nonambulatory animals "at any time," was a regulation of the "premises, facilities and operations" "different than" federal law, which only prohibits such animals from being dragged "while conscious" and permits the dragging of "stunned animals," 9 C.F.R. § 313.2(d)(2). Pet. App. 15a-16a. While the Ninth Circuit found NMA "likely to succeed on its express preemption claim against section 599f(e)," it remanded for more sufficient findings concerning irreparable harm and the balance of the equities with respect to this specific provision. *Id.* at 16a-17a. The Ninth Circuit observed, in its conclusion, that "[n]othing we say here precludes the entry of a preliminary injunction as to section 599f(e) after appropriate findings are made, or a preliminary injunction as to the entirety of section 599f based on other legal theories." *Id.* at 17a. Its ruling that there is no express preemption of Section 599f(a)-(c), however, was definitive, and not open on remand.

REASONS FOR GRANTING THE PETITION

In *Rath Packing*, this Court "clearly laid out the path [courts] must follow" in determining whether Section 678 of the FMIA preempts state law. 430 U.S. at 525. While acknowledging the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," *id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)), this Court held that the FMIA was a specific example of "when Congress has 'unmistakably . . . ordained' that its enactments alone are to regulate a part of commerce, [in which case] state laws regulating that aspect of commerce must fall." *Id.* (internal citation omitted).

Notwithstanding this binding precedent concerning the "broad meaning" of the FMIA's preemption provisions, *id.* at 540, the Ninth Circuit determined on its own that the "presumption against preemption" mandated a "narrow interpretation" of the FMIA's preemption clause. Pet. App. 8a. The Ninth Circuit's decision thus squarely conflicts with this Court's precedent, as well as other appellate courts' interpretation of the FMIA. *See, e.g, Armour*, 468 F.2d at 84 ("Congress has 'unmistakably . . . ordained' that the Federal [Meat Inspection] Act fixes the sole standards.").[12]

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[12] The California Court of Appeals recently explicitly rejected an argument that a term in Section 678's express

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The Ninth Circuit's departure from *Rath Packing* is rooted in its erroneous invocation and understanding of this Court's jurisprudence concerning the presumption against preemption. *See* Pet. App. 7a, 8a. While it should have simply followed *Rath Packing* here unless and until this Court ruled otherwise, the Ninth Circuit's confusion over the role of the presumption against preemption shows the effect on the lower courts of the "ongoing disagreement" among members of this Court "as to if, when, and how this presumption applies." *Demahy*, 593 F.3d at 434.

It is critical that this Court address these issues now, at this stage of the case. The status quo – the supremacy of uniform federal law under the FMIA – has thus far been maintained, notwithstanding the Ninth Circuit's decision on the merits, only because the Ninth Circuit has stayed its mandate pending this Court's review. This will no longer be true, of course, if this Court denies certiorari until after the remainder of the case is resolved. The Ninth Circuit's ruling that there is no express preemption was made as a matter of law, and is not open on remand. What will change if review is not granted now is that a State, for the first time, will be allowed to impose,

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preemption language be "narrowly interpreted" for preemption purposes, and the California Supreme Court notably denied review of that decision even *after* the Ninth Circuit's opinion in this case had issued. *Am. Meat Institute v. Leeman*, 102 Cal. Rptr. 3d 759, 781 (Cal. Ct. App. 2009), *review denied* (Cal. Apr. 14, 2010).

piece by piece, its own additional and different regulations with respect to how federally-inspected slaughterhouses are to conduct handling, inspection, and slaughtering operations on their premises. In the present case, these State requirements would, in effect, preempt federal regulations providing for the separation, inspection, and slaughter of non-ambulatory swine and eliminate for those animals the federal ante-mortem inspection process which plays a central role in the early detection of serious communicable diseases. The gap in the federal animal health safety net which would be created by the California law would bring with it the risk of dangerous consequences for animal and public health. For all these reasons, as discussed below, this Court should grant review, and should do so now.

I. THE NINTH CIRCUIT'S DETERMINATION THAT THE PRESUMPTION AGAINST PREEMPTION TRUMPS THE PLAIN TERMS OF THE FMIA'S EXPRESS PREEMPTION CLAUSE CONFLICTS WITH *RATH PACKING* AND THIS COURT'S PREEMPTION JURISPRUDENCE

When this Court examined the FMIA's preemptive scope, it held that "th[e] explicit pre-emption provision dictates the result in th[is] controversy." *Rath Packing*, 430 U.S. at 530-31. It came to this conclusion because it determined that there is a "clearly laid . . . path" that "must [be] follow[ed] to answer this question" of FMIA preemption. *Id.* at

525. As this Court explained, while it is of course important to recognize the role States have historically played, that is only the beginning of the inquiry. Where, as with the FMIA, Congress has used its power to legislate in a field otherwise "traditionally occupied by the States, 'we *start* with the assumption that the historic police powers of the States were not to be superseded by the Federal Act *unless* that was the clear and manifest purpose of Congress.'" *Id.* (internal citations omitted; quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230) (emphasis added).

The Ninth Circuit followed the first step, observing that a "presumption against preemption" exists in areas of historical state regulation, but paid no heed to what this Court said must follow, with specific regard to the FMIA: "But when Congress has 'unmistakably . . . ordained' that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall." *Id.* (internal citation omitted). The guiding principle, this Court made clear, is that "this result" – the preemption of state law – is "*compelled* [when] Congress' command is *explicitly stated in the statute's language.*" *Id.* (internal citations omitted) (emphasis added).

What this Court found to be "explicitly stated in the [FMIA's] language" was a preemption provision intended to be given "a broad meaning," *id.* at 540 (comparing the FMIA to the narrower preemption language of the Fair Packaging and Labeling Act ("FPLA"), 15 U.S.C. § 1461) – a view of the Act wholly at odds with the "narrow interpretation" the Ninth

Circuit now feels it "must give this provision" based upon the presumption against preemption, Pet. App. 8a. Indeed, in *Rath Packing* this Court not only stated the applicable principles for FMIA preemption, it instructively applied them: It gave full force to the FMIA's plain language prohibiting state laws "'in addition to, or different than, those made under' the Act,"[13] and engaged in a careful parsing of California's labeling requirements as compared with those found under the FMIA. 430 U.S. at 526-32 and accompanying notes. In the process, the Court made clear that preempted "differences" extend even to minute distinctions between state and federal standards.[14]

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[13] *Rath Packing* directly involved Section 678's parallel, identically-worded preemption language providing that: "Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State. . . ." 21 U.S.C. § 678. In rendering its decision, the Court took the full preemption clause, including the language at issue here, into account. *Rath Packing*, 430 U.S. at 530 n.17.

[14] At issue in *Rath Packing* were weight labels for bacon, where the net weights on the label would often differ from the actual weight of the bacon due to bacon's loss of moisture to its wrapping materials and the atmosphere, as well as the fact that "since bacon is cut in discrete slices, it is impossible to guarantee that each package will contain exactly the stated weight when packed." *Rath Packing*, 430 U.S. at 530 n.16. This Court carefully studied the statistical sampling methods employed by the State of California, *see id.* at 531 n.18, and methods of measuring the weight of the packaging material with respect to moisture loss, *see id.* at 527 n.10, in holding that "the state law's requirement – that the label accurately state the net weight, with implicit allowance only for reasonable manufacturing

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Here, any doubt that California's law is "different than" the FMIA was settled when the federal government expressly considered the very requirements contained in Section 599f – barring the slaughter of all nonambulatory animals and instead requiring their immediate euthanization without further inspection – and expressly rejected them. 74 Fed. Reg. at 11464; *compare with* Cal. Penal Code §§ 599f(b)&(c). Yet the Ninth Circuit nonetheless concluded the opposite, reasoning that, because California law "doesn't require *any* additional or different inspections than does the FMIA, [it] is thus not a regulation of the 'premises, facilities and operations' of slaughterhouses." Pet. App. 11a (emphasis in original). That premise – that California law "doesn't require any additional or different inspections than does the FMIA" – is both wrong (requiring "immediate action to humanely euthanize the animal" *without* inspection is certainly different than requiring an antemortem inspection) and misfocused, because the plain terms of Section 678 do not use the term "inspections" at all; instead, they provide for the much broader preemption of *any* State "requirements . . . with respect to premises, facilities and operations" of a federally-regulated slaughterhouse "which are in addition to, or different than those made under this chapter."

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variations – is 'different than' the federal requirement, which permits manufacturing deviations and variations caused by moisture loss during good distribution practice," *id.* at 531-32.

This error came about, in part, because the Ninth Circuit reversed this Court's two-step process for analyzing preemption clauses barring "different" or "additional" state requirements. Under that process, a court first "must determine whether the Federal Government has established requirements applicable to" the subject – in this case, the handling of nonambulatory swine – and only then "determine whether . . . [the State law] requirements with respect to [the handling of nonambulatory swine] are 'different from, or in addition to' the federal ones." *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 321-22 (2008). When California's law is properly reviewed under this two-step inquiry, its preemption is clear. The FMIA and its implementing regulations expressly and comprehensively govern slaughterhouse "operations" concerning nonambulatory swine from the moment they arrive at or become nonambulatory on federally-inspected slaughterhouse "premises." California's law is "different than" the federal requirements, and is thus plainly not "equivalent to, and fully consistent with" the FMIA, as is required to avoid preemption under Section 678. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 447 (2005) (defining "in addition to or different from").

In order to save the state law from preemption, the Ninth Circuit had to say, in effect, that a state law regulating what a slaughterhouse must do on its premises does not regulate slaughterhouse premises or operations. This is fundamentally wrong, as *Rath Packing* again makes clear. In that case, the

petitioner was faced with the same conclusion that "the state law's requirement . . . is 'different than' the federal requirement," and it "[sought] to avoid this result by arguing that the FMIA's provisions governing the accuracy of the required net-quantity statements are not 'labeling requirements' within the meaning of section 408." *Rath Packing*, 430 U.S. at 531-32. This Court, however, expressly rejected "the restrictive meaning . . . ascribe[d]" to such "requirements." *Id.* at 532; *accord Lewis*, 235 U.S. at 286 ("We are unable to discern any sufficient reason for giving to the language of the [FMIA] so limited an application."). As this Court held in *Rath Packing*, "It twists the language beyond the breaking point to say that a law mandating that labeling contain certain information is not a 'labeling requirement.'" *Rath Packing*, 430 U.S. at 532. So too here: to say that a law mandating how nonambulatory swine are to be handled on slaughterhouse premises is not a "requirement[] . . . with respect to premises, facilities and operations" likewise "twists the language beyond the breaking point" and cannot save the state law from preemption.

This Court's decision in *Rath Packing* thus makes clear that California Penal Code § 599f must give way to the express preemptive language in the FMIA. This Court has also made clear that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this

Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Rather than engaging in its own application of the presumption against preemption, the Ninth Circuit should have followed *Rath Packing*, and its square conflict with that decision is an important ground for granting review.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONTINUING CONFUSION AS TO IF, WHEN, AND HOW A PRESUMPTION AGAINST PREEMPTION APPLIES TO EXPRESS PREEMPTION PROVISIONS

The Ninth Circuit's failure to follow *Rath Packing* was premised on its understanding of a line of decisions of this Court invoking the presumption against preemption in other contexts. Pet. App. 7a-8a. It cited footnote 3 of *Wyeth* in particular, and also invoked its prior decision in *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir. 2005), where, over a dissent, *id.* at 505, the court had applied the presumption against preemption to an express preemption clause based on its understanding of this Court's decisions in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), *United States v.*

Locke, 529 U.S. 89, 108 (2000), and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992).[15]

This reasoning by the Ninth Circuit was doubly defective. It not only failed to follow *Rath Packing*, but also failed to understand that, where Congress has used the type of express preemption language found in the FMIA, no presumption *against* preemption comes into play at all. That the Ninth Circuit nonetheless thought *Wyeth* and other decisions of this Court invoking the presumption controlled is indicative of the sort of confusion among the lower courts that only this Court can clarify.

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[15] The Ninth Circuit also erred in saying its "narrow interpretation" of Section 678 was all the "more so" required by the fact that Section 678 has a provision which allows states to pass requirements or take other actions regarding "any other matters regulated under this chapter" not covered by the express preemption clause, as long as they are "consistent with" federal requirements. Pet. App. 8a-9a. The Ninth Circuit said this provision "preserves for the states broad authority to regulate slaughterhouses." *Id.* at 8a. But that same provision was in Section 678 when this Court reviewed it in *Rath Packing*, *see* 430 U.S. at 530 n.17, and it did not alter this Court's holding. Moreover, this Court has said courts should "decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Locke*, 529 U.S. at 106. And this Court has granted review in *Chamber of Commerce v. Candelaria*, No. 09-115, 78 U.S.L.W. 3762 (cert. granted June 28, 2010), in part to review the Ninth Circuit's use in that case of a saving clause to override an express preemption provision (in that case, provisions of the Immigration Reform and Control Act of 1986 found at 8 U.S.C. § 1324a(h)(2)).

The question of when a presumption against preemption should apply has been a topic of recent and repeated debate within this Court. *See generally Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543-49 (2008); *id.* at 555-58 (Thomas, J., dissenting) (describing ongoing debate in the Court on this issue). That debate has included the role which any presumption against preemption should properly play in interpreting express preemption clauses. *See, e.g., id.* And that debate has not been resolved: Whereas in *Altria* the majority *applied* a presumption against preemption (drawn from the plurality opinion in *Cipollone*) to an express preemption clause (in the Federal Cigarette Labeling and Advertising Act), *id.* at 549, in *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009), all Justices, whether members of the majority or dissent, concurred that a presumption against preemption *did not apply* to the plain terms of the preemption clause at issue there. *Cuomo*, 129 S. Ct. at 2720 ("We have not invoked the presumption against pre-emption, and think it unnecessary to do so in giving force to the plain terms of the National Bank Act."); *id.* at 2732 (Thomas, J., concurring in part and dissenting in part: "There should be no presumption against pre-emption because Congress has expressly pre-empted state law in this case.").

This Court's "ongoing disagreement . . . as to if, when, and how this presumption applies," *Demahy*, 593 F.3d at 434, has left the lower courts in ongoing confusion. Some federal appellate courts assert the presumption against preemption always applies in

express preemption analysis. *See, e.g., Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010) (*en banc*) ("The presumption is relevant even when there is an express pre-emption clause."); *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1060 (9th Cir. 2009) ("This presumption against preemption leads us to the principle that express preemption statutory provisions should be given a narrow interpretation." (quoting *Air Conditioning & Refrigeration Inst.*, 410 F.3d at 496)). Others recognize the presumption's existence, but limit its reach. *See, e.g., N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 123 (2d Cir. 2009) (recognizing "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," but finding the presumption to be of no force given that the federal act in question "is clear on preemption"), and *Smith v. CSX Transp., Inc.*, No. 09-16080, 2010 U.S. App. LEXIS 11351, at *3 (11th Cir. June 3, 2010) ("the presumption against preemption dissipates when the intention of Congress is 'clear and manifest'"). And sometimes it is wholly ignored. *E.g., Chae v. SLM Corp.*, 593 F.3d 936, 942, 944 (9th Cir. 2010) (stating "[w]e use the text of the provision, the surrounding statutory framework, and Congress' stated purpose in enacting the statute to determine the proper scope of an express preemption provision," and invoking the presumption against preemption only in its conflict preemption analysis).

Needless to say, only this Court can resolve this confusion. That this confusion has contaminated the analysis of an express preemption clause as "clear and manifest" as that in the FMIA, where Congress has "unmistakably ordained" that the FMIA alone is to regulate handling and inspection, shows the time for this Court to act, is, respectfully, now.[16]

III. THE IMMEDIATE RISK TO ANIMAL AND HUMAN HEALTH AND SAFETY CREATED BY THE CALIFORNIA LAW COUNSELS IMMEDIATE REVIEW

Serious public health concerns raised by state law displacement of the FMIA's uniform and systematic inspection regime also counsel for this Court's review now. Under the FMIA, federal inspection program personnel inspect pigs that become nonambulatory to determine which are truly sick and present a risk to human or animal health, and which are merely fatigued and perfectly suitable for slaughter and consumption. *See* 9 C.F.R. § 309.2(b). Federal ante-mortem inspection is the process for the detection of, among other things, certain serious communicable porcine diseases. Emergency measures, such as segregation or quarantine of the entire lot of

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[16] This Court's grant of certiorari in No. 09-152, *Bruesewitz v. Wyeth, Inc.*, 130 S. Ct. 1734 (cert. granted March 8, 2010), may present an occasion to address some aspects of the presumption against preemption, but will involve a very different preemption clause. *Compare* 21 U.S.C. § 678 *with* 42 U.S.C. § 300aa-22.

livestock, and the notification of higher officials, are triggered by early onsite detection of such diseases by federal veterinarians (or the inspectors they supervise) during ante-mortem inspection. *See, e.g.*, 9 C.F.R. § 309.5 (swine with hog cholera); 9 C.F.R. § 309.15 (vesicular disease).

Under the California law, however, "no slaughterhouse shall hold a nonambulatory animal," and must instead "take immediate action to . . . euthanize the animal." Cal. Penal Code § 599f(c). This will prohibit federal veterinarians and inspectors from holding for ante-mortem inspection any pig "unable to stand and walk without assistance," Section 599f(i), including any pigs afflicted with one of the above diseases, some of the symptoms of which, such as elevated temperature for certain vesicular diseases, *see* 9 C.F.R. § 309.15(b), are not measurable on animals post-mortem. Even for those diseases which can be detected post-mortem, emergency response actions such as segregation or quarantine will be significantly delayed.

Similarly, Section 599f(a)'s ban on the mere receipt of nonambulatory animals will require swine slaughterhouses to change their federally-sanctioned procedures for accepting swine. Slaughterhouses will no longer be able to hold, inspect, and if necessary humanely euthanize swine found to be nonambulatory upon arrival in a truck. Instead, animal suffering and the possible spread of communicable diseases will be exacerbated because such pigs may not be "receive[d]" under Section 599f(a), and will

instead have to remain on the vehicle to be transported to some other destination (if one exists) where they can be received under California law. *See* C.A.App. 886 (Terrill Decl. ¶ 7).

The California law thus destroys the uniform, systematized process by which federal public health veterinarians screen nonambulatory animals for diseases prior to slaughter, and – turning federal preemption on its head – criminalizes the actions of slaughterhouse operators who obey federal regulations with respect to the handling of nonambulatory swine. Addressing this issue now is particularly important. Other states, such as Washington and New York, have also passed or have pending similar bills purporting to regulate slaughterhouse actions towards nonambulatory livestock on slaughterhouse premises. Wash. Rev. Code § 16.52.225 (gross misdemeanor for a person to "knowingly . . . accept delivery of live nonambulatory livestock to, from, or between any livestock market, feedlot, slaughtering facility, or similar facility"; rather "[n]onambulatory livestock must be humanely euthanized before transport to, from, or between locations [already] listed"); Wash. Rev. Code § 16.36.116 (civil infraction for "[a]ny person who knowingly transports or accepts delivery of live nonambulatory livestock to, from, or between any livestock market, feedlot, slaughtering facility, or similar facility"); State Assemb. A05512, 2009-2010 Reg. Sess. (N.Y. 2009) (Summary: A bill that "[p]rohibits . . . holding . . . [or] receiving . . . a nonambulatory animal unless such animal is first

humanely euthanized without undue delay"; same as S 751). These laws in general, and California's in particular, give rise to serious public health concerns if their displacement of the FMIA is allowed to stand.

IV. THE NINTH CIRCUIT'S RADICAL EXPANSION OF THE "HORSEMEAT" CASES SERIOUSLY IMPACTS FMIA PREEMPTION

Review of the Ninth Circuit's opinion is also warranted by its radical expansion of recent cases which have allowed states to regulate "the types of meat that can be sold for human consumption" without running afoul of the FMIA. *Empacadora*, 476 F.3d at 333. The Fifth and Seventh Circuits grounded their decisions on the principle that, "[if] horse meat is produced for human consumption, its production must comply with the Meat Inspection Act. But if it is not [so] produced, there is nothing, so far as horse meat is concerned, for the Act to work upon." *Cavel*, 500 F.3d at 554. In other words, where states have horsemeat bans, such animals are never allowed to enter federally-regulated slaughterhouse premises for slaughter, and such laws thus do not in any way alter the federal rules governing what is to occur *inside* those establishments. *See id.* Such state laws do not regulate *which* horses on federally-regulated premises may be subject to ante-mortem inspection and suitable for slaughter; they ban *all* horses from even entering the federal premises at all.

Unlike the horsemeat laws, however, California's statute encroaches upon precisely what the FMIA "is more naturally read as being concerned with[:] the methods . . . that slaughterhouses use" on their premises. *Empacadora*, 476 F.3d at 333. This is because the Ninth Circuit's attempt to broaden the "type of meat" distinction so as to also extend to a State's ability to regulate the "kind of animal" that may be slaughtered, Pet. App. 9a-11a, ignores that the State here has chosen to regulate a mutable characteristic often exhibiting itself in particular animals of a kind otherwise suitable for slaughter only after those animals are already on federally-regulated slaughterhouse grounds. *See supra* n.6. Indeed, the Ninth Circuit itself strained against this categorization, cautioning that "state[s] may try to establish stricter inspection standards, and style the new standards as a regulation of the 'kind of animal' that may be slaughtered," Pet. App. 11a, while failing to acknowledge that this is *precisely* what the State of California has done in this case. Nonetheless, while a horse is always a horse, a pig is not always nonambulatory, and it may well first become so only after entering the slaughterhouse premises. Congress has made clear, however, that once on federally-regulated slaughterhouse grounds, federal law is to set the sole standards. 21 U.S.C. § 678; *see Rath Packing*, 430 U.S. at 525, 532; *Armour*, 468 F.2d at 84. Allowing Section 599f to stand as it relates to swine thus violates the FMIA's preemptive scope, given the need for uniformity "lest meat providers be forced to master various separate operating

techniques to abide by conflicting state laws," *Empacadora*, 476 F.3d at 334, as would be the case here.

V. THIS CASE, IN ITS CURRENT POSTURE, IS A GOOD VEHICLE FOR RESOLVING THESE IMPORTANT ISSUES

The issues presented by this case are important, and this suit, in its present procedural posture, is a particularly good vehicle for taking up these questions. First, the fundamental tension between the "narrow interpretation" the Ninth Circuit has said the presumption against preemption demands, in contrast with the "broad meaning" this Court has said the plain language of the FMIA's express preemption provision otherwise compels, allows this Court to explore the limits of the presumption's effect in a way that more restrained express preemption provisions (like that at issue in *Bruesewitz v. Wyeth Inc.*, No. 09-152) do not.

Furthermore, not only does the federal statute at issue make this a good vehicle for clarifying the presumption's proper place, but in this particular suit, the presumption was not only clearly invoked, it was dispositive of the express preemption issue. It was only because the Ninth Circuit believed it "must give the [FMIA's preemption] provision a narrow interpretation" that it contorted other circuits' "type of meat" distinction into a broad "kind of animal" category, allowing California law to regulate the

handling of *individual* animals already legally on slaughterhouse premises – precisely what Section 678 of the FMIA preempts. The effect of this decision is particularly acute, given the grave public health risks implicated by the displacement of federal ante-mortem inspection. By staying the mandate pending this petition for certiorari, the Ninth Circuit took the significant step of preserving the status quo (FMIA supremacy) to allow this Court to review the important issues presented in this case.

Finally, it is entirely appropriate for the Court to grant certiorari now, to review the Ninth Circuit's reversal of a preliminary injunction, as this Court has recently done with respect to another Ninth Circuit matter. *See Doe v. Reed*, 130 S. Ct. 2811, 177 L. Ed. 2d 493, 501 (2010) (granting certiorari of Ninth Circuit's reversal of district court's preliminary injunction, while other proceedings were still pending before the district court). Here, the express preemption ruling is a clear, definitive decision, made as a matter of law, not open to change on remand, on which *en banc* review by the circuit has been denied, and dispositive of the suit if preemption is found to exist. Moreover, unlike many other contexts, this issue should not be allowed to fester unresolved as other issues are tried, since it is at the preliminary injunction stage where "the rubber meets the road" in preemption matters – the point in time when the state is trying to take over, or take primacy in, a federally-regulated area. Indeed, if, as here, the express preemption provision of a federal law has not

on its own deterred the state from legislating in an area, a preliminary injunction is the very means by which express preemption must be enforced if the status quo of federal supremacy is not to be upset. *See Deckert v. Independence Shares Corp.*, 311 U.S. 282, 290 (1940) ("We hold that the injunction was a reasonable measure to preserve the status quo pending final determination of the questions raised. . . .").[17] This is of particular significance here, where, if California's law is allowed to go into effect, it would disrupt a uniform federal regime that has been in place for decades, and bring with it potentially grave consequences for both animal and public health. The Ninth Circuit's stay of the mandate pending this petition, which stay in effect preserved the preliminary injunction order the Ninth Circuit had just

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[17] Similarly, it is no impediment to this Court's review of the Ninth Circuit's decision that one of the respondents has sought an administrative change in the FMIA regulations (on which FSIS has to date apparently taken no action). *See* Farm Sanctuary, Petition submitted to FSIS to amend 9 C.F.R. § 309.3(e) to prohibit the slaughter of non-ambulatory pigs, sheep, goats, and other livestock and to require that such animals be humanely euthanized (Mar. 15, 2010), *available at* http://www.fsis.usda.gov/regulations_&_policies/Petitions/index.asp (last visited Aug. 10, 2010). Unless and until the FSIS, the agency charged by Congress with implementing the FMIA, decides to change federal law, the express provisions of the FMIA preserve the status quo by preempting state law, and the Ninth Circuit's decision to the contrary here – which was based on its interpretation of the language of the preemption provision, which statutory language is of course not subject to change by the FSIS – merits review by this Court.

vacated, underscores the importance of the express preemption issues implicated in this suit, and shows that court's acknowledgment of the merit in having this Court fully resolve the express preemption question now, *before* the State law is allowed to be enforced against swine slaughterhouses. For all these reasons, this suit, in its present procedural posture, is a good vehicle for this Court to resolve the important preemption issues presented by this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 13, 2010

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL MEAT ASSOCIATION,
Plaintiff-Appellee,

and

AMERICAN MEAT INSTITUTE,
Plaintiff-intervenor,

v.

EDMUND G. BROWN, in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA,
Defendants-Appellants,

and

THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,
Defendant-intervenors.

No. 09-15483

D.C. No.
1:08-cv-01963-
LJO-DLB

NATIONAL MEAT ASSOCIATION,
Plaintiff-Appellee,

and

AMERICAN MEAT INSTITUTE,
Plaintiff-intervenor,

v.

EDMUND G. BROWN, in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA,
Defendants,

and

THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,
Defendant-intervenors-Appellants.

No. 09-15486

D.C. No. 1:08-cv-01963-LJO-DLB

OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted
August 11, 2009 – San Francisco, California

Filed March 31, 2010

Before: Alex Kozinski, Chief Judge, Stephen Reinhardt and Barry G. Silverman, Circuit Judges.

Opinion by Chief Judge Kozinski

COUNSEL

Edmund G. Brown Jr., Attorney General of California, Douglas J. Woods, Acting Senior Assistant Attorney General, and Susan K. Leach, Deputy Attorney General, Los Angeles, California, for the defendants-appellants.

Sarah L. Conant and Peter A. Brandt, The Humane Society of the United States, Washington, D.C.; and Bruce A. Wagman, Schiff Hardin LLP, San Francisco California, for the defendant-intervenor-appellants.

Steven J. Wells and Heather M. McCann, Dorsey & Whitney LLP, Minneapolis, Minnesota, for the plaintiff-appellee.

OPINION

KOZINSKI, Chief Judge:

This is an interlocutory appeal from a preliminary injunction prohibiting the enforcement of California Penal Code § 599f, which bans the slaughter and inhumane handling of nonambulatory animals, against federally regulated swine slaughterhouses.

I

On January 30, 2008, The Humane Society released a video depicting images of nonambulatory cows – cows that are unable to stand or walk without assistance – being kicked, electrocuted, dragged with chains and rammed with forklifts at California's Westland/Hallmark slaughterhouse. Footage also showed some workers trying to get nonambulatory cows to stand by spraying pressurized water into their noses to simulate drowning. Public health professionals warned that meat from these "downer" cows was more likely to be diseased, partly because animals can become nonambulatory due to disease and partly because downer animals grow sicker as they end up rolling around in other animals' refuse. The video triggered the largest beef recall in United States history.

California responded by amending California Penal Code § 599f to provide that:

> (a) No slaughterhouse, stockyard, auction, market agency, or dealer shall buy, sell, or receive a nonambulatory animal.
>
> (b) No slaughterhouse shall process, butcher, or sell meat or products of nonambulatory animals for human consumption.
>
> (c) No slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.

> (e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

Cal. Pen. Code § 599f. Together these provisions: (1) ban the receipt and slaughter of downer animals, *id.* § 599f(a)-(c); and (2) require the humane handling of downer animals, *id.* § 599f(e).

Shortly before amended section 599f was to take effect, National Meat Association (NMA) – a trade association representing packers and processors of swine livestock and pork products – filed suit in federal district court against the State of California seeking declaratory and injunctive relief barring the application of section 599f to federally inspected swine slaughterhouses.[1] Some of its members claimed that section 599f would prevent the slaughter of approximately 2.5% of their pigs. NMA argued that section 599f is preempted by the Federal Meat Inspection Act (FMIA), violates the dormant commerce clause and is unconstitutionally vague. The district court entered a preliminary injunction on preemption

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[1] American Meat Institute, a trade association which represents meat packagers and processors, intervened as a plaintiff but didn't seek preliminary relief.

grounds;[2] the State of California and defendant-intervenors The Humane Society, et al., who supported the bill amending section 599f, bring this interlocutory appeal.

II

We review for abuse of discretion and will reverse if the district court's decision is based on an erroneous legal standard or clearly erroneous finding of fact. *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009). Preemption is a legal issue we review de novo. *Am. Trucking Ass'ns* v. *City of L.A.*, 559 F.3d 1046, 1052 (9th Cir. 2009). Someone seeking a preliminary injunction must demonstrate "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter* v. *Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008).[3]

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[2] The district court didn't reach the dormant commerce clause and vagueness claims. Neither do we.

[3] The district court applied our pre-*Winter* "sliding scale" approach, which required only a "possibility of irreparable injury" if plaintiff is likely to succeed on the merits. *See Stormans*, 586 F.3d at 1126-27. In some instances, this error may require remand for application of the *Winter* standard. Here, however, the district court found that NMA is likely to succeed and faces a significant threat of irreparable injury, and that the balance of the equities and the public interest favors NMA. These findings

(Continued on following page)

Receipt and Slaughter Ban

Congress, as well as federal agencies, may expressly or impliedly preempt state law. *Barrientos* v. *1801-1825 Morton LLC*, 583 F.3d 1197, 1208 (9th Cir. 2009). There is express preemption where federal law explicitly preempts state law. *Altria Group, Inc.* v. *Good*, 129 S. Ct. 538, 543 (2008). There is implied preemption where federal law was intended to occupy the legislative field or where state law conflicts with federal law, either because it's impossible to comply with both laws or because state law stands as an obstacle to accomplishing the purposes of federal law. *See id.*; *English* v. *Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). In either case, there's a strong presumption against preemption, especially when the state law deals with matters like health and animal welfare, which have historically been regulated by states. *See Wyeth* v. *Levine*, 129 S. Ct. 1187, 1194-95 n.3 (2009).

1. **Express Preemption.** NMA argues, and the district court held, that the FMIA expressly preempts section 599f's ban on the receipt and slaughter of nonambulatory animals. Under the FMIA, all animals are sent to federal inspection before they enter a slaughterhouse where they are to be slaughtered for meat capable of human consumption that will be sold in commerce. 21 U.S.C. § 603(a). Regulations pursuant to the FMIA require nonambulatory animals to be

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enable us to review the injunction under *Winter* without remanding for application of the new standard.

classified as "U.S. Suspect" and held for further examination. 9 C.F.R. § 309.2(b). If the downer animal shows signs of certain diseases upon inspection, it must be classified as "U.S. Condemned" and disposed of according to specific procedures. *See id.* §§ 309.4-309.18. But if the animal passes inspection, it may be slaughtered and sold for human consumption. *See generally id.* § 309.2.[4]

The FMIA contains an express preemption provision:

> Requirements within the scope of this chapter with respect to *premises, facilities and operations* of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State. . . .

21 U.S.C. § 678 (emphasis added). Consistent with the presumption against preemption, we must give this provision a narrow interpretation. *See Air Cond. & Refrig. Inst.* v. *Energy Res. Conserv. & Dev. Comm'n,* 410 F.3d 492, 496 (9th Cir. 2005). More so because section 678 explicitly preserves for the states broad authority to regulate slaughterhouses: "This chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with

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[4] All nonambulatory cattle, however, must be classified as U.S. Condemned and may not be slaughtered for human consumption. *See* 9 C.F.R. § 309.3(e).

this chapter, with respect to any other matters regulated under this chapter." 21 U.S.C. § 678.

Starting, as we should, with the language of the statute, we find no express preemption. Section 678 preempts state regulation of the "premises, facilities and operations" of slaughterhouses, and section 599f(a)-(c) deals with none of these. Rather, it regulates the kind of animal that may be slaughtered. Two circuits have held that the FMIA doesn't preempt state laws that do precisely that. *Cavel Int'l, Inc.* v. *Madigan,* 500 F.3d 551 (7th Cir. 2007) (state ban on horse slaughter not preempted); *Empacadora de Carnes de Fresnillo* v. *Curry,* 476 F.3d 326 (5th Cir. 2007) (same). These cases explain that "[the FMIA] preemption clause expressly limits states in their ability to govern meat inspection and labeling requirements. It in no way limits states in their ability to regulate what types of meat may be sold for human consumption in the first place." *Empacadora,* 476 F.3d at 333. "*Given* that horse meat is produced for human consumption, its production must comply with the [FMIA]. But if it is not produced, there is nothing, so far as horse meat is concerned, for the Act to work upon." *Cavel,* 500 F.3d at 554. This makes horse sense: Federal law may establish fireworks safety standards, but that doesn't preclude states from banning fireworks. Similarly, the FMIA establishes inspection procedures to ensure animals that are slaughtered are safe for human consumption, but this doesn't preclude states from banning the slaughter of certain kinds of animals altogether.

The district court sought to distinguish *Cavel* and *Empacadora*: "A nonambulatory pig is not a 'type of meat.' A pig is a pig. A pig that is laying down is a pig. A pig with three legs is a pig. A fatigued or diseased pig is a pig. Calling it something else does not change the type of meat produced." In effect, the district court reasoned that states may ban the slaughter of certain species, but once a state allows a species to be slaughtered, it cannot impose further restrictions. Hogwash.

States aren't limited to excluding animals from slaughter on a species-wide basis. What if a state wanted to ban the slaughter of a specific breed of pig but not the entire species? Or to allow wild dogs and horses to be slaughtered, but not domesticated companions? And what if, in response to a population problem, a state only banned the slaughter of female cattle? Or, perhaps due to ethical concerns, prohibited the slaughter of pregnant or newborn animals, or the slaughter of non-free-range animals? Regulating what kinds of animals may be slaughtered calls for a host of practical, moral and public health judgments that go far beyond those made in the FMIA. These are the kinds of judgments reserved to the states, and nothing in the FMIA requires states to make them on a species-wide basis or not at all. Federal law regulates the meat inspection process; states are free to decide which animals may be turned into meat.

It is possible that a state may go too far in regulating what "kind of animal" may be slaughtered. For example, a state may feel that federal inspection

standards for diamond-skin disease (9 C.F.R. § 311.6), arthritis (*id.* § 311.7) or sexual odor of swine (*id.* § 311.20) are too lenient. The state may try to establish stricter inspection standards, and style the new standards as a regulation of the "kind of animal" that may be slaughtered: "The kind of pig that tests positive under procedure X for sexual odor may not be slaughtered." Or enforcement of a state regulation of what "kind of animal" may be slaughtered might require certain inspections: "Pigs with arthritis may not be slaughtered. Slaughterhouses shall perform Y and Z procedures to screen for the condition." Such regulations could effectively establish a parallel state meat-inspection system.

We need not decide what limits the express preemption provision places on such regulations. California's prohibition of the slaughter of nonambulatory animals does not duplicate federal procedures; it withdraws from slaughter animals that are unable to walk to their death. This prohibition doesn't require *any* additional or different inspections than does the FMIA, and is thus not a regulation of the "premises, facilities and operations" of slaughterhouses. There is no express preemption here.

2. **Implied Preemption.** NMA's implied preemption claim concerning section 599f's ban on the receipt and slaughter of nonambulatory animals fares no better. That 21 U.S.C. § 678 specifies "[t]his chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this chapter, with respect to any other matters

regulated under this chapter" shows that Congress didn't intend to occupy the field of slaughterhouse regulation, so only conflict preemption is at issue. Conflict preemption is a demanding standard, as courts won't "seek[ ] out conflicts between state and federal regulation where none clearly exists." *English,* 496 U.S. at 90 (internal quotation marks omitted).

It's not physically impossible to comply with both section 599f and the FMIA. FMIA inspection requirements apply to animals that are to be slaughtered for human consumption. *See* 21 U.S.C. §§ 603(a), 641. And nothing in the FMIA *requires* the slaughter of downer animals for human consumption. NMA hangs its impossibility argument on words like "shall" in the federal regulations – for example, "[a]ll . . . nonambulatory disabled livestock *shall* be identified as U.S. Suspects and disposed of as provided in § 311.1 of this subchapter unless they are required to be classed as condemned under § 309.3." 9 C.F.R. § 309.2(b) (emphasis added). But these regulations don't require the slaughter of downer animals; no slaughterhouse operator would be fined by federal authorities if he gave nonambulatory animals medical care and put them up for adoption as pets. Federal regulations require inspection *if* downer animals are to be slaughtered. *See Cavel,* 500 F.3d at 553-54 ("When the [FMIA] was passed . . . it was lawful in some states to produce horse meat for human consumption, and since the federal government has a legitimate interest in regulating the production of human food . . . it was natural to

nake the Act applicable to horse meat. That was ıot a decision that states must allow horses to be ılaughtered for human consumption.").[5] Whether they nay be slaughtered is up to the states.

Section 599f also isn't an obstacle to accom-ɔlishing the purposes of the FMIA.[6] The FMIA was ıdopted to protect the health and welfare of consumers "by assuring that meat and meat food products dis-ɔributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 602; *Pittsburgh Melting Co.* v. *Totten*, 248 U.S. 1, 4-5 (1918); *see also United States* v. *Stanko*, 491 F.3d 408, 416-17 (8th Cir. 2007). Its purpose is certainly not to

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[5] NMA argues that, for the few animals that become non-ambulatory after being presented for federal inspection (rather than arriving at the slaughterhouse nonambulatory), federal authorities must give their permission for release of these animals. That's because 9 C.F.R. § 309.2(p) says that, after an animal has been presented for inspection, "[w]hen a suspect is to be released . . . for a purpose other than slaughter, the operator of the official establishment or the owner of the animal shall first obtain permission for the removal of such animal. . . ." But state and local officials may also release animals for purposes other than slaughter. 9 C.F.R. § 309.2(p). Moreover, there's no reason to suppose that federal officials wouldn't willingly give permission to euthanize downer animals. *Cf. Wyeth*, 129 S. Ct. at 1198 ("[A]bsent clear evidence that the FDA would not have approved a change to Phenergan's label, we will not conclude that it was impossible for Wyeth to comply with both federal and state requirements.").

[6] Contrary to NMA's argument that California waived its objection to the district court's obstacle holding, California clearly addressed the issue in its opening brief.

preserve the slaughter of any kind of animal for human consumption. *Cavel,* 500 F.3d at 554. Nor do we see any indication that Congress intended to leave the choice of what kinds of animals to slaughter to individual slaughterhouses. *Compare Fla. Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 147-48 (1963) (federal law meant only to establish uniform minimum standards of avocado quality to which states could add), *with Geier* v. *Am. Honda Motor Co.,* 529 U.S. 861, 881 (2000) ("no airbag" tort claim pre-empted because federal law sought to preserve a variety of safety devices from which manufacturers could choose).

Section 599f would only serve as an obstacle to the FMIA if its requirements were so onerous and confusing that it put slaughterhouse compliance with federal inspection standards at risk. Nothing in the record suggests that this is the case, nor will we assume it to be. *Cf. Empacadora,* 476 F.3d at 334 ("The need for uniform meat packaging, inspection and labeling regulations is strong, lest meat providers be forced to master various separate operating techniques to abide by conflicting state laws. There is no similar need for uniformity with regard to what types of meat states permit to be sold. . . ."). Section 599f's directive to slaughterhouses is simple: When slaughterhouses see a nonambulatory animal, they cannot slaughter it for human consumption but must euthanize it immediately. There is no reason to believe that slaughterhouse employees who abide by this directive will have any difficulty complying with

federal inspection standards as to those animals that will be slaughtered for food.[7]

Humane Handling Requirements

Section 599f(e) provides that "[w]hile in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time. . . ." Federal law, by contrast, says that "[t]he dragging of disabled animals and other animals unable to move, *while conscious,* is prohibited. *Stunned animals may, however, be dragged.*" 9 C.F.R. § 313.2(d)(2) (emphases added). And while the FMIA's inspection requirements apply to animals that are to be slaughtered for human consumption, the FMIA's humane handling requirements apply to all animals at the slaughterhouse. FSIS Directive 6100.1 at 4 ("All animals that are on the premises of the establishment . . . are to be handled humanely."). Section 599f(e) thus prohibits conduct – the dragging of unconscious downer animals – that federal law does not.

Federal law also considers more equipment suitable for the purposes of moving downer animals, such

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[7] NMA suggests that section 599f will prevent the examination of downer animals for disease, hindering federal procedures designed to identify and stem the spread of disease. Nothing in the record substantiates this concern, and section 599f doesn't prohibit post-mortem inspection of downer animals.

as electric prods, than does section 599f(e). *Compare* 9 C.F.R. § 313.2(d)(3) ("Disabled animals and other animals unable to move may be moved, while conscious, on equipment suitable for such purposes; e.g., stone boats."), *and* FSIS Directive 6900.1(V)(E) (suitable equipment includes "forklift or bobcat-type vehicles and self-propelled tractors capable of pulling stone boats (sleds) or similar conveyances, those conveyances themselves, and holding chutes, and a voltmeter or other suitable equipment that is capable of verifying voltage of electric prods attached to AC current."), *with* Cal. Pen. Code § 599f(e) (nonambulatory animals "shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance."). Section 599f(e) is thus a regulation of the "operations" of an "establishment at which [federal] inspection is provided" that's "in addition to[] or different than" federal law and is therefore expressly preempted. 21 U.S.C. § 678.

Although NMA is likely to succeed on its express preemption claim against section 599f(e),[8] it must still show a likelihood of irreparable injury and that the balance of the equities and the public interest tip in its favor in order to justify a preliminary injunction. *See* pp. 5073-74 *supra*. The district court's findings

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[8] Contrary to NMA's argument, the likelihood of success as to section 599f(e) doesn't affect the likelihood of success as to section 599f(a)-(c). *See Dalton* v. *Little Rock Family Planning Servs.*, 516 U.S. 474, 478 (1996) (enjoining provision only to the extent that it imposes obligations inconsistent with federal law).

concerning irreparable injury and the balance of the equities focus on the costs of complying with section 599f's ban on the receipt and slaughter of downer animals. The district court failed to make such findings as to section 599f(e)'s humane handling requirements, probably because NMA failed to offer any evidence on the issue.

* * *

NMA isn't likely to succeed on its preemption claims against section 599f(a)-(c)'s ban on the receipt and slaughter of downer animals. And although NMA is likely to succeed on its preemption claim against section 599f(e)'s humane handling provision, it hasn't shown a likelihood of irreparable injury or that the balance of the equities and the public interest tip in its favor for this provision. The district court therefore abused its discretion in granting a preliminary injunction, and the injunction is hereby vacated. Nothing we say here precludes the entry of a preliminary injunction as to section 599f(e) after appropriate findings are made, or a preliminary injunction as to the entirety of section 599f based on other legal theories, *see* p. 5073 n.2 *supra*.

VACATED.

No costs.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

NATIONAL MEAT ASSOCIATION,

Plaintiff,

and

AMERICAN MEAT INSTITUTE,

Plaintiff-Intervenor

v.

EDMUND GERALD BROWN, et al.,

Defendants.

HUMANE SOCIETY, et al.

Defendant-Intervenors.

CASE NO. CV-F-08-1963 LJO DLB

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE MOTION FOR PRELIMINARY INJUNCTION; PRELIMINARY INJUNCTION ORDER

(Filed Feb. 19, 2009)

Pursuant to notice filed on December 23, 2008, Plaintiff National Meat Association moves the Court for a preliminary injunction enjoining Defendants Edmund G. Brown, Arnold Schwarzenegger, and the State of California (collectively "defendants" or "California") from enforcing California Penal Code § 599f, as amended and effective January 1, 2009, against swine slaughterhouses regulated by the Federal Meat Inspection Act, 21 U.S.C. § 601 et seq. Defendants filed an opposition on January 28, 2009. Plaintiffs filed a reply on February 4, 2009. Due to the thorough

briefing by the parties and no response to the Court's invitation to request oral argument, the Motion for Preliminary Injunction was taken under submission pursuant to Local Rule 78-230(h) and the hearing set for February 25, 2009 was vacated. Having considered the moving, opposition, and reply papers, as well as the Court's file, the Court issues the following order.

FACTUAL OVERVIEW

Plaintiff National Meat Association is a voluntary membership-based trade association that represents the interests of packers and processors of livestock, including swine, and meat, including pork and pork products throughout the United States. Plaintiff Intervenor American Meat Institute is a voluntary membership-based trade organization which has members in California that package and process meat products.

The defendants are the State of California and its officers Arnold Schwarzenegger and Edmund Brown, the Governor and Attorney General, respectively. Defendant intervenors The Humane Society of the United States, Farm Sanctuary, Inc., the Humane Farming Association, and Animal Legal Defense Fund are non-profit organizations dedicated to the advocacy and protection of animals.

A. California Penal Code § 599f, as amended

Effective January 1, 2009, California Penal Code § 599f, as amended ("Section 599f"), prohibits the sale of meat or meat product of "nonambulatory" animals for human consumption, and requires the immediate euthanization of nonambulatory animals. Defendants argue that Section 599f was amended in response to video footage obtained by the Humane Society of inhumane treatment of animals at a slaughterhouse facility. In addition to the concern for the humane treatment of the animals, the public health concern was raised as to the meat derived from "downed animals." (Doc. 53, California's Opposition p. 3.) Downed animals may be susceptible to various diseases and have a greater likelihood of carrying disease, which can be passed onto humans from contaminated meat. Defendants argue that the amendments to Section 599f prohibit the purchase, slaughter and sale of non-ambulatory ("downed") animals for the protection of people, the animals and the food supply. (Doc. 53, California's Opposition p. 3-4.)

Section 599f provides:

> 599f. Nonambulatory animals; slaughter houses, stockyards, auctions, market agencies, or dealers; transactions; processing; euthanasia; movement; violations
>
> (a) *No slaughterhouse,* stockyard, auction, market agency, or dealer shall *buy, sell, or receive a nonambulatory animal.*

(b) *No slaughterhouse shall process, butcher, or sell meat or products* of *nonambulatory animals for human consumption.*

(c) *No slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.*

(d) No stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

(e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

(f) No person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

(g) No person shall accept a nonambulatory animal for transport or delivery to a slaughterhouse, stockyard, auction, market agency, or dealer.

(h) A violation of this section is subject to imprisonment in the county jail for a

> period not to exceed one year, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and imprisonment.
>
> (I) As used in this section, *"nonambulatory" means unable to stand and walk without assistance.*
>
> (j) As used in this section, "animal" means live cattle, swine, sheep, or goats.
>
> (k) As used in this section, "humanely euthanized" means to kill by a mechanical, chemical, or electrical method that rapidly and effectively renders the animal insensitive to pain. (Emphasis added.)

Section 599f prohibits a slaughterhouse from buying, selling, or receiving nonambulatory animals for human consumption. Any such animal that is received nonambulatory or becomes so after receipt must be euthanized. Cal.Penal Code §599f(c).

B. Effect upon Plaintiff

Plaintiff argues that Section 599f will expand dramatically the restrictions and prohibitions governing the manner in which federally-inspected slaughterhouses in California, including those that slaughter swine, may purchase and process livestock for slaughter and the manner in which they may sell meat, including pork and pork products. Plaintiff argues that Section 599f expands the scope of criminal

penalties imposed on such slaughterhouses and their employees for violations of the statute.

REQUEST FOR PRELIMINARY INJUNCTION

Plaintiff moves for a preliminary injunction to enjoin enforcement of Section 599f against swine slaughterhouses pending resolution of the case on the merits. Plaintiff argues that it is entitled to a preliminary injunction because it has a substantial likelihood of success on the merits, will be irreparably harmed if enforcement is not so enjoined and does not have an adequate remedy at law. Absent injunctive relief, plaintiff argues its members will suffer irreparable injury, including potential criminal and monetary penalties and significant disruption of their members' business operations. Plaintiff argues no adequate remedy at law exists because the State of California's sovereign immunity from suit.

A. Injunction Standards

The legal principles applicable to a request for preliminary injunctive relief are well established. To prevail, the moving party must show either "(1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [the moving party's] favor." *Oakland Tribune, Inc. v. Chronicle Publishing Company, Inc.*, 762 F.2d 1374, 1376 (9th Cir. 1985), ***quoting*** *Apple Computer, Inc. v. Formula International,*

Inc., 725 F.2d 521, 523 (9th Cir. 1984). Plaintiff need not show positively it will prevail on the merits. A reasonable probability of success, not an overwhelming likelihood, is all that need be shown for preliminary injunctive relief. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991). The two formulations represent two points on a sliding scale with the focal point being the degree of irreparable injury shown. *Oakland Tribune*, 762 F.2d at 1376. "Under either formulation of the test [for injunctive relief], plaintiff must demonstrate that there exists a significant threat of irreparable injury." *Id.*

A preliminary injunction's purpose is to preserve the status quo if the balance of equities so heavily favors the moving party that justice requires the court to intervene to secure the positions until the merits of the action are ultimately determined. *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830 (1981). "Status quo" means the last uncontested status that preceded the pending controversy. *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000). Additional criteria must be satisfied for a preliminary injunction to be available to a plaintiff:

1. A strong likelihood of success on the merits;

2. Possibility of irreparable harm to plaintiff absent an injunction;

3. Threatened injury to plaintiff outweighs damage which the proposed injunction may cause to the opposing party; and

4. Public interest favors issuance of an injunction.

See Regents of the Univ. of California v. American Broadcasting Companies, Inc., 747 F.2d 511, 515 (9th Cir. 1984); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980).

B. Likelihood of Success on the Merits

Plaintiff argues that it has a strong likelihood of success on the merits because Section 599f is preempted. Plaintiff argues that Section 599f, as applied to swine slaughter houses, is preempted by the provisions of the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. §601 et seq.

1. The Preemption Doctrine

The preemption doctrine has its roots in the Supremacy Clause of the Constitution, which provides that the Constitution, laws, and treaties of the United States are the "supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

Federal preemption can be either express or implied. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53, 102 S.Ct. 3014, 73

L.Ed.2d 664 (1982); *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 982 (9th 2008). When a federal statute contains an explicit preemption provision, we are to "'identify the domain expressly preempted' by that language." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992)). Express preemption statutory provisions, however, should be given a narrow interpretation. *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008), *petition for certiorari* filed, 77 USLW 3366 (Dec 10, 2008).

Implied preemption has two subcategories. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001); *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d at 982. The first is field preemption, where "the depth and breadth of a congressional scheme . . . occupies the legislative field." *Id.* (citing *Fid. Fed. Sav.*, 458 U.S. at 153, 102 S.Ct. 3014). The second is conflict preemption, which occurs when either "compliance with both federal and state regulations is a physical impossibility," *Fid. Fed. Sav.*, 458 U.S. at 152, 102 S.Ct. 3014 (quoting *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963)), or where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fid. Fed. Sav.*, 458 U.S. at 152 (internal quotation marks omitted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85

L.Ed. 581 (1941)). For conflict preemption to apply, the conflict must be an actual conflict, not merely a hypothetical or potential conflict. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 89, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990).

2. Arguments on Express Preemption

Plaintiff argues that the Federal Meat Inspection Act expressly preempts states from enacting laws which impose additional or different requirements on meat processing and inspections. Plaintiff argues that 21 U.S.C. §678 precludes state requirements which are "in addition to, or different than those under this chapter . . . " Plaintiff argues the Section 599f imposes additional or different requirements because it prohibits slaughterhouses from allowing meat from a nonambulatory animal, in particular swine, to be processed or butchered for human consumption. This differs from federal law which allows slaughterhouses to set aside disabled or fatigued animals for inspection. In addition, Section 599f imposes an additional prohibition on slaughterhouses' buying or receiving nonambulatory animals. Plaintiff argues that Section 599f simultaneously expands the scope of criminal penalties imposed on such slaughterhouses and their employees for violations of the statute.

Defendants argue the Congress specifically allowed states to enact laws consistent with the Federal Meat Inspection Act and did not expressly preempt state laws: "This Act shall not preclude any State . . . from

making requirement[s] or taking other action, consistent with this Act, with respect to any other matters regulated under this Act." 21 U.S.C. §678. Defendants acknowledge that the FMIA expressly preempts in two areas: (1) the "premises, facilities and operations of any establishment at which inspection is provided," and (2) the "marking, labeling, packaging and ingredient requirements." Defendants acknowledge that the FMIA exclusively deals with certain aspects of the meat inspection process, but defendants argue that all other aspects may be regulated. (Doc. 53, California's Opposition p. 7-8.) Defendants argue that §678 of the FMIA does not limit a state from regulating what "type of meat" may be sold for human consumption, citing *Empacadora De Carnes De Fresnillo v. Curry,* 476 F.3d 326, 333 (5th Cir.), *cert. denied,* 127 S.Ct. 2443, 167 L.Ed.2d 1131 (2007). (Doc. 53, Opposition p. 8.) Defendants note that there is no provision in FMIA or the regulations that expressly provide for the method nonambulatory animals are processed and slaughtered.

Further, defendants argue the federal regulations implementing the FMIA contemplate disposal of nonambulatory animals and do not require that this "type of meat" be processed and introduced into the food supply. (Doc. 53, Opposition p. 8, citing 9 C.F.R. §§ 309.2(b), 309.3(a-c), 309.13, 313.2(d).) And *Cavel Intern., Inc. v. Madigan*, 500 F.3d 551, 554 (7th Cir. 2007) (The Act is concerned with inspecting premises at which meat is produced for human consumption, see, e.g., 21 U.S.C. § 606, rather than with preserving

the production of particular types of meat for people to eat), *cert. denied*, 128 S.Ct. 2950, 171 L.Ed.2d 863 (2008). Defendants argue Section 599f specifies what type of meat may enter the food supply and how to humanely treat the animals. It does not regulate the "premises, operations" or govern the "marking, labeling and packaging" of ingredients. No specific language in the FMIA expressly forbids California from specifying what type of meat may be processed for human consumption.

3. The Federal Meat Inspection Act ("FMIA")

Plaintiff challenges Section 599f's provisions, as applied to swine slaughterhouses in the State of California, as conflicting with those imposed under the FMIA, 21 U.S.C. § 601 et seq. and its implementing regulations. Plaintiff argues that Section 599f expands the prohibitions governing the manner in which federally-inspected slaughterhouses located within the State of California, including those that slaughter swine, may purchase and process livestock for slaughter and the manner in which they may sell meat, including pork and pork products.[1]

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[1] Defendant Intervenors, The Humane Society *et. al*, contend the challenge to Section 599f is untimely. Section 599f has been in existence for 14 years and was amended in July 2008. The Humane Society contends plaintiff has delayed enforcing its rights-first in the 14 years of the statute's existence, and then from the delay from July 2008 to December 2008, shortly before Section 599f went into effect. Section 599f, however, has not

(Continued on following page)

The Federal Meat Inspection Act, 21 U.S.C. § 601 et seq., was enacted by Congress in 1907 in response to concerns over the safety of meat and meat products. The FMIA provides "an elaborate system of inspection of animals before slaughter, and of carcasses after slaughter and of meat-food products, with a view to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products in interstate and foreign commerce." *Pittsburgh Melting Co v. Totten,* 248 U.S. 1, 4-5, 39 S.Ct. 3, 3 (1918). The very purpose of the FMIA is to ensure the safety of the nation's food supply and to minimize the risk to public health from potentially dangerous food and drug products. See 21 U.S.C. § 602 (stating that "[i]t is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged"); *U.S. v. Stanko*, 491 F.3d 408, 416 (8th Cir. 2007) (FMIA's primary public-health purpose is to protect consumers from unsafe meat, citing 21 U.S.C. §602), *cert. denied,* 128 S.Ct. 1874, 170 L.Ed.2d 752 (2008).

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been in its current, challenged form for 14 years. The amended Section 599f, effective January 1, 2009, differs because it no longer exempts federally-inspected slaughterhouses from its prohibition on buying, selling, or receiving a nonambulatory animal; it requires the immediate euthanization of any animal that becomes nonambulatory while awaiting slaughter; and it prohibits processing meat from nonambulatory animals. Thus, the Court rejects the argument based on untimeliness.

Congress included an express provision that preempts States from enacting any processing or inspection law that adds to or is different from those enacted under the FMIA. Section 678 states in part:

> Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided . . . which are *in addition to, or different than* those made under *this chapter* may not be imposed by any State. . . .

21 U.S.C. § 678 (emphasis added). The chapter referred to is the chapter for "Meat Inspection." 21 U.S.C. §601 et seq. This preemption clause expressly limits a state in its ability to govern meat inspection requirements. *Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry,* 476 F.3d 326, 333 (5th Cir. 2007).

Congress did not intend to preempt the entire field of meat commerce under the FMIA. The Act's title refers specifically to meat inspection, rather than a more comprehensive scheme of meat regulation. The FMIA permits the states to create laws consistent with the FMIA, for "other matters":

> This chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this chapter, with *respect to any other matters* regulated under this chapter.

21 U.S.C. § 678 (emphasis added). The FMIA thus permits states to regulate what types of meat may be sold for human consumption in the first place. *Empacadora,* 476 F.3d at 334 (holding that the FMIA does not preempt the type of meat, such as horse meat, which can be sold for human consumption). The FMIA did not expressly preempt Texas's prohibition on horsemeat for human consumption. *See also U.S. v. Stanko,* 491 F.3d at 418 (FMIA does not preempt state unfair-trade-practices laws in general).

The FMIA is a public health statute, aimed at "preventing the use in commerce of meat and meat food products which are adulterated. . . ." 21 U.S.C. § 603(a):

> § 603. Inspection of meat and meat food products:
>
> (a) Examination of animals before slaughtering; diseased animals slaughtered separately and carcasses examined
>
> *For the purpose of preventing the use in commerce of meat and meat food products which are adulterated, the Secretary shall cause to be made, by inspectors* appointed for that purpose, *an examination and inspection* of all amenable *species before they shall be allowed to enter* into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in

> commerce; and all amenable species found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other amenable species, and when so slaughtered the carcasses of said amenable species shall be subject to a careful examination and inspection, all as provided by the rules and regulations to be prescribed by the Secretary, as provided for in this subchapter. (Emphasis added.)

FMIA requires the Secretary of Agriculture to examine and inspect "all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering or similar establishment. . . ." 21 U.S.C. § 606:

> § 606. Inspectors of meat food products; marks of inspection; destruction of condemned products; products for export; catfish examination and inspection
>
> (a) In general
>
> For the purposes hereinbefore set forth the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment . . .

The act has broad coverage – requiring slaughter in accordance with the FMIA. 21 U.S.C § 610 (requiring

slaughter to be in compliance with the chapter on meat inspection.)

4. Implementing Regulations

The Food Safety and Inspection Service ("FSIS"), an agency of the United States Department of Agriculture ("USDA"), is charged with implementing and enforcing the FMIA. See 21 U.S.C. § 601 et seq. ("The term Secretary means the Secretary of Agriculture"). The FMIA's implementing regulations are set forth in Title 9 of the Code of Federal Regulations, 9 C.F.R. § 301 et seq., and govern the meat production process from the time animals are delivered to the slaughterhouse to the time consumers purchase the meat product.

The implementing regulations establish the inspection procedure from the initial arrival of the animals at a facility. "All livestock . . . entering any official establishment . . . shall be inspected, handled, . . . as required by the regulations in this subchapter." 9 C.F.R. § 302.3. The implementing regulations set out a procedure for identifying and handling "non-ambulatory disabled livestock." First, the implementing regulations define "disabled livestock," with symptoms of: "(5) Lack of muscular coordination; (6) Inability to walk normally or stand." 9 C.F.R. § 301.2.

The USDA classifies all downed livestock presented for slaughter as "U.S Suspects." A non-ambulatory disabled animals may be set aside and later presented for slaughter.

> (b) All seriously crippled animals and non-ambulatory disabled livestock shall be identified as U.S. Suspects and disposed of as provided in § 311.1 of this subchapter unless they are required to be classed as condemned under § 309.3. Non-ambulatory disabled livestock are livestock that cannot rise from a recumbent position or that cannot walk, . . .

9 C.F.R. § 309.2(b). Animals which are identified as "U.S. Suspect," including non-ambulatory disabled livestock, are set aside and handled according to a set procedure:

> (n) Each animal identified as a U.S. Suspect on ante-mortem inspection shall be set apart and shall be slaughtered separately from other livestock at that establishment unless disposed of as otherwise provided in this part.
>
> (m) Each animal identified as a U.S. Suspect on ante-mortem inspection, when presented for slaughter shall be accompanied with a form MP 402-2 on which the inspector at the establishment. . . .

9 C.F.R. § 309.2. The regulations provide that U.S. Suspects and "disabled livestock" shall be separated: "Disabled livestock and other animals unable to move . . . shall be separated from normal ambulatory animals and placed in the covered pen." 9 C.F.R. § 313.2. These animals are held in the "covered pen . . . while awaiting disposition by the inspector." 9 C.F.R. § 313.1(c). If upon inspection, the downed animal shows signs of

certain diseases, it is condemned and disposed of according to specified procedures. See 9 C.F.R. §§ 309.4-309.15. However, if the downed animal passes postmortem inspection by a veterinary officer, it may be passed in whole or in part for human food. See generally 9 C.F.R. § 311.1.

Thus, the FMIA, along with its implementing regulations, is a public health statute the scope of which is to examine and inspect meat and meat products and employing procedures and methods to ensure the safety of the nation's food supply and to minimize the risk to public health.

5. Express Preemption of Section 599f

The FMIA's preemption clause expressly limits states in their ability to govern meat inspection and labeling requirements "of any establishment at which inspection is provided [under the statute]." 21 U.S.C. §678. *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 153 ("Federal regulations have no less preemptive effect than statutes.")

California's statute, which requires meat products to be handled in a manner other than that prescribed by the FMIA or the USDA regulations, is "in addition to or are different than" the federal regulations. The express preemption provision contemplates all meat inspection shall be according to the standards in FMIA. Section 599f alters the process and methods for the receipt of animals, the determination of the animal as "disabled" or "nonambulatory,"

and also alters the subsequent handling of the non-ambulatory animal. *Empacadora*, 476 F.3d at 333 (the FMIA's preemption clause is more naturally read as being concerned with the methods, standards of quality, and packaging that slaughterhouses use). The FMIA and its implementing regulations permit a slaughterhouse to set aside for further inspection an animal that is nonambulatory.

Section 599f, on the other hand, expressly requires that the same animal be "immediately" euthanized. Assessing whether the animals are ambulatory or nonambulatory is undoubtedly an "inspection." Assessing whether the animals are ambulatory or nonambulatory is, by defendants' admission, in order to protect quality of the food supply. Determining what to do with an animal found to be "nonambulatory" is part of an inspection. Pursuant to Section 599f, upon an inspection and determination that an animal is "nonambulatory," the animal must be euthanized. The FMIA does not contain such a requirement. The implementing regulations require the animal to be set aside for further inspection.

The FMIA expressly prohibits state requirements that are "in addition to" or "different than" those in FMIA. Section 599f imposes inspection requirements upon federally inspected slaughterhouses which are in addition to or different than FMIA. Thus, Section 599f is expressly preempted by the FMIA. 21 U.S.C. § 678 ("Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided . . .

which are in addition to, or different than those made under this chapter may not be imposed by any State.")

Defendants argue that the FMIA does not limit California's ability to regulate the "type of meat" which may be sold for human consumption, citing *Empacadora*, 476 F.3d at 334 (holding that the FMIA does not preempt the type of meat, such as horse meat, which can be sold for human consumption). Defendants argue that Section 599f limits the "type of meat" sold for human consumption. It limits the type of meat by limiting meat of "nonambulatory animals." The "type of meat" is "nonambulatory meat." Here, California argues that it limited the "type of meat" sold for human consumption by prohibiting purchasing, selling or processing nonambulatory animals, just as Texas and Illinois prohibit the processing of horse meat for human consumption. *See also Cavel Int'l*, 500 F.3d 551 (The FMIA's preemption clause did not preempt Illinois statute making it unlawful to slaughter horses for human consumption).

California's argument is without merit. *Empacadora* stated that the FMIA does not prohibit a state from barring any particular type of animal from being introduced into the food chain, such as horse meat. *Empacadora,* 476 F.3d at 333 ("The FMIA does not expressly dispose states of the ability to define what meats may be available for slaughter and human consumption."); *Cavel,* 500 F.3d at 554, (acknowledging that if a certain animal specifies are not produced for human consumption, the FMIA does not apply).

Thus, a state rightly could preclude different types of meat for human consumption, such as horse meat or dog meat or rat meat, for that matter. A nonambulatory pig is not a "type of meat." A pig is a pig. A pig that is laying down is a pig. A pig with three legs is a pig. A fatigued or diseased pig is a pig. Calling it something else does not change the type of meat produced. Thus, the exception discussed in *Empacadora* does not apply.

Pursuant to *Empacadora* and *Cavel,* California could prohibit *all* pigs from being processed for human consumption and not be preempted by FMIA. However, California permits pigs to be produced for human consumption. Therefore, California is barred from imposing additional or different inspection requirements on animals to be produced for human consumption. Having allowed pigs and swine to enter the food supply, California cannot alter the federally mandated requirements of inspection. *See Nat'l Broiler Council v. Voss,* 44 F.3d 740, 745 (9th Cir. 1994) (In interpreting identical express preemption language in the Poultry Products Inspection Act ("PPIA"), 21 U.S.C. § 467e, the Ninth Circuit held that the phrase "in addition to, or different than" preempts States from enforcing any regulations "not identical" to federal requirements.)

California also argues that plaintiff cites to no provision in the FMIA or the regulations which expressly provides for how nonambulatory animals shall be processed and slaughtered in the normal course of business. As shown above, the federal

regulations govern how an animal is handled and processed from the time the animal enters the slaughterhouse premises. FMIA intends to regulate the "premises, facilities and operations" of federally inspected slaughterhouses. Indeed, regulations are in place which process the very kind of nonambulatory animals that are addressed in Section 599f.

California argues that Section 599f is required to protect humane treatment of animals. FMIA and its implementing regulations, however, contain provisions for the humane treatment of animals. See, e.g., 21 U.S.C. §610 (inhumane slaughter prohibited); 9 C.F.R. §313.1(livestock pens); 2 C.F.R. §313.9 (handling of livestock). California is not precluded from enforcing the provisions of the FMIA. The FMIA allows for concurrent state jurisdiction to enforce its requirements. See 21 U.S.C. § 678. However, such concurrent jurisdiction does not allow states to enact their own additional requirements. *Nat'l Broiler Council v. Voss,* 44 F.3d 740, 746 (9th Cir.1994) (finding preemption under FMIA and noting that states may enforce the federal labeling laws, but that the USDA did not grant states authority to enact their own, additional requirements).

Accordingly, Section 599f impermissibly "differs from" and is "addition to" the FMIA and is therefore preempted by such federal laws.

6. "Conflict Preemption"

Plaintiff argues that Section 599f is impliedly preempted because it conflicts with the FMIA. Plaintiff argues uniformity in the federal regulation of meat inspections was of paramount importance to Congress, and trumps California's efforts to enact a different, conflicting law with respect to the human consumption of nonambulatory animals, citing *Armour & Co. v. Ball*, 468 F.2d 76, 84-85 (6th Cir. 1972), *cert. denied*, 411 U.S. 981, 93 S.Ct. 2267 (1973); *see also Nat'l Boiler Council*, 44 F.3d at 746. Swine slaughterhouses in California currently follow standard operating procedures. Under federal regulations, nonambulatory animals may be delivered to slaughterhouse but under Section 599f such animals would have to be refused and returned to shipper. Animals that are later unable to stand would have to be euthanized immediately. Nonambulatory animals due to fatigue may be slaughtered under federal regulations but not under Section 599f.

Defendants argue that Section 599f is consistent with the federal provisions. A slaughterhouse may comply with federal law while complying with Section 599f. Defendants argue that there is no federal requirement that an animal without the ability to stand and walk be held at the slaughterhouse. There is no federal requirement that slaughterhouses hold nonambulatory animals until the animal is inspected. Rather, it is the slaughterhouse's economic choice to hold the animal.

Conflict preemption analysis examines the federal statute as a whole to determine whether a party's compliance with both federal and state requirements is impossible or whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives. *Whistler Investments, Inc. v. Depository Trust and Clearing Corp.*, 539 F.3d 1159, 1164 (9th Cir. 2008), citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000).

Here, the implied conflict preemption analysis is substantially similar to the analysis of the Act's express preemption provision. As noted *infra*, the FMIA provides an elaborate meat inspection scheme "with a view to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products in interstate and foreign commerce." *Pittsburgh Melting Co v. Totten*, 248 U.S. at 4-5. The purpose of the FMIA is to ensure the safety of the nation's food supply and to minimize the risk to public health from potentially dangerous food and drug products. 21. U.S.C. § 602. The FMIA and the implementing regulations contain comprehensive requirements for meat inspection, handling and processing. Section 599f imposes different or additional requirements on inspection, handling and processing meat. For instance, "disabled" livestock, which is defined in part as unable to stand and walk, are subject to further inspection. Under Section 599f, disabled livestock must be immediately euthanized.

Defendants argue that there is no implied preemption because there is no federal requirement that a disabled animal be set aside for further inspection. (Doc. 53, Opposition p.11.) California argues that the animal can be immediately euthanized without violating any federal requirement.

Section 599f is in conflict with the FMIA and its implementing regulations. The regulations state that disabled livestock shall be identified as U.S. Suspects (21 C.F.R. §309.2) and set aside for further inspection and disposition. 9 C.F. R. §313.2. Section 599f conflicts with the regulatory scheme because it alters the federally mandated procedure once an animal is identified as disabled. This inspection procedure is part of a comprehensive scheme to ensure the quality of the meat supply. While California argues that it too seeks to protect the meat supply, it is doing so with language that conflicts with the procedure described in the implementing regulations. These additional state requirements conflict in areas that are clearly encompassed by the federal regulations.

7. Plaintiff's Dormant Commerce Clause and "Constitutionally Vague" Arguments

Since the Court has found that Section 599f is expressly and impliedly preempted by the FMIA and its implementing regulations, the Court does not need to reach the additional arguments that Section 599f violates the dormant commerce clause and is unconstitutionally vague.

C. Irreparable Injury

Plaintiff argues that its members will be irreparably harmed unless the Court grants injunctive relief. Plaintiff's members face a conflict between complying with the FMIA's processing and safety inspection requirements or the different and conflicting requirements of Section 599f. Section 599f imposes imprisonment and monetary fines for failure to comply. Plaintiff also argues that Section 599f will result in substantial disruption of members' business operations. Plaintiff gives as an example that at one facility, the facility will be required to euthanize and render approximately 225 additional hogs per day, which requires a costly expansion of the facility and a significant loss of annual revenues. (Doc. 20, Terrill Decl. ¶9 (225 hogs), ¶12 (cost of compliance).) These losses, plaintiff further argues, cannot be compensated at law because Defendants enjoy immunity from suit for damages.

California argues that plaintiff has not presented evidence that there will be a substantial disruption of members' business. Plaintiff fails to cite to any evidence that 225 hogs are temporarily unable to walk (citing Plaintiff's brief at p. 22.) There is no testimony on how many of the 225 hogs would pass federal inspection; plaintiff simply assumes all would fail federal inspection. Further, defendants argue plaintiff over estimates the number of hogs needed to be euthanized, including hogs that are sleeping, stress or fatigued.

A preliminary injunction "may only be granted when the moving party has demonstrated a significant threat of irreparable injury, irrespective of the magnitude of the injury." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999). Plaintiff "must demonstrate immediate threatened harm." *Caribbean Marine Serv. Co., Inc. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988). Plaintiff must demonstrate potential harm which cannot be redressed by a legal or equitable remedy following trial. The preliminary injunction must be the only way of protecting the plaintiff from such harm. *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3rd Cir. 1992).

Here, the evidence establishes that plaintiff's members comply with the FMIA inspection requirements. There is no evidence that plaintiff's members fail to so comply. In compliance with the FMIA, plaintiff's members process into the food supply swine which are "nonambulatory." There is no argument or evidence that the members are in violation of the FMIA for processing such nonambulatory animals into the food supply. Thus, the evidence establish that the plaintiff's members are in compliance with the FMIA when they process nonambulatory animals, which pass federal inspection, into the food supply.

The parties are in agreement that same animals would be barred from processing into the food supply under Section 599f. Plaintiff presents evidence of the quantity of swine which would be precluded from being processed for human consumption and the corresponding estimated monetary loss for one of its

members. Defendants argue that speculative injury does not support "irreparable harm," citing *Big Country Foods, Inc. v. Board of Ed. Of Anchorge Sch. Dist.* 868 F.2d 1085, 1088 (9th Cir. 1989) (plaintiff was out bid and sued to enjoin the governmental entities' acceptance of the lower bid. The Court held that irreparable harm is not shown where the "lost profits" from a contract are speculative.)

Here, the evidence is not speculative as to the economic harm. First, the evidence indicates, and certainly common sense corroborates, that an animal meant for human consumption is worth more than an animal designated for scrap. The evidence presented shows some level of significant monetary harm. The defendants quibble over the exact number of pigs which would be rendered or the exact monetary value of such animals. What is required is *some* irreparable injury must be threatened; otherwise, injunctive relief will be denied. A preliminary injunction "may only be granted when the moving party has demonstrated a significant threat of irreparable injury, *irrespective of the magnitude of the injury*." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d at 725 (emphasis added). Further, if additional animals cannot be processed into the food supply, plaintiff's members must have a way to dispose of nonambulatory animals. Common sense indicates that facilities may need to be expanded or alternative means contracted for to dispose of the animals. In addition, plaintiff's members face potential criminal penalties for following the mandates of federal law.

The monetary losses are not compensable because defendants are entitled to sovereign immunity. It is well established that agencies of the state are immune under the Eleventh Amendment from private damages or suits for injunctive relief brought in federal court. *See, e.g., Savage v. Glendale Union High School, Dist. No. 205, Maricopa County,* 343 F.3d 1036, 1040 (9th Cir. 2003) citing *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). The Eleventh Amendment precludes suits "in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1195 (9th Cir. 2005). A State may waive its sovereign immunity by consenting to suit. *Id.* Here, there is no argument that California has waived its sovereign immunity. Accordingly, relief in the form of monetary damages is barred by California's sovereign immunity.

Defendant intervenors argue that plaintiff's members were in violation of the predecessor to Section 599f – in that the predecessor statute required slaughterhouses to immediately euthanize nonambulatory animals. The Humane Society argues that plaintiff was in violation of the prior law, and that the practices for euthanizing animals preexisted for 14 years before the amendment to section 599f. Thus, the Humane society argues, there can be no irreparable harm.

This argument is summarily dismissed. The former Section 599f did not apply to federally inspected slaughterhouses. The amended Section 599f changed the law, and encompassed federally inspected slaughterhouses. Under former 599f, federally inspected slaughterhouses were not covered, and therefore were not required to comply with the provision to euthanize animals.

The Court finds that plaintiff is faced with an immediate threat of irreparable harm, given that (1) Section 599f conflicts with the provisions of the FMIA, (2) compliance with Section 599f will require slaughterhouses to divert to rendering nonambulatory animals covered by Section 599f, which will increase the cost of processing scrap meat and reduce the revenue from human consumable animals, (3) plaintiff's members face criminal penalties for failure to do so, and (4) monetary damages are noncompensable because defendants are immune. For these reasons, Plaintiff has shown a sufficient threat of irreparable injury or loss for which there is no adequate remedy to support a preliminary injunction.

D. Equities in Favor of California

California argues that the equities weigh in favor of enforcement of the statute. California argues that in light of the health hazards of meat from nonambulatory animals slaughtered for human consumption, California acted to protect the public's food supply and promote humane treatment of animals.

Protection of the food supply far outweighs the purported economic harm to plaintiff.

Under Ninth Circuit precedent, the Court must examine the public interest involved. The public interest inquiry primarily addresses the impact on non-parties rather than parties. *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002). When interim equitable relief is authorized and the public interest is involved, "courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *United States v. First Nat'l City Bank,* 379 U.S. 378, 383, 85 S.Ct. 528, 531 (1965). Injunctive relief may be refused where it would adversely affect the rights of persons who are not parties to the litigation. *Horwitz v. Southwest Forest Indus., Inc.,* 604 F.Supp. 1130, 1136 (D NV 1985); *see Publications Int'l, Ltd. v. Meredith Corp.,* 88 F.3d 473, 478 (7th Cir. 1996). Where the public interest is involved, the court must also determine whether the public interest favors the moving party. *Sammartano,* 303 F.3d at 974.

The public interest in this case is significant. The public interest deals with the quality and quantity of meat entering into the food supply. California's interest is in ensuring that the meat supply is not tainted by diseased or potentially diseased animals. As discussed more fully above, downed animals have been shown to have increased risk of carrying

disease. California has a significant interest in ensuring the health of its citizens from properly handled and slaughtered animals.

On the other side of the equation, the risk of harm is minimized by the FMIA and its implementing regulations. The very purpose of the FMIA is to reduce and eliminate the potential risk of infecting the food supply through comprehensive inspection procedures. Thus, California's public interest in protecting the quality of the food supply is embodied in the FMIA and its implementing regulations.

There is the risk of harm should Section 599f NOT be enjoined. The risk exists for a reduction in the quantity of the food supply. As more fully explained above, the FMIA inspection procedures are designed to eliminate the risk of disease, with the concomitant benefit of maximizing the abundance of the food supply. It is uncontroverted that California's statutory scheme will reduce, in some part, the amount of meat introduced into the food supply. It takes animals out of the food supply which would/might pass federal inspection. This Court does not have before it the evidence to determine whether this reduction in and of itself is significant, but the evidence establishes that some reduction in the food supply will occur. *Sierra Club v. Georgia Power Co.*, 180 F.3d 1309, 1310 (11th Cir. 1999) (Preliminary injunction denied where the harm to the public from reduced electrical power outweighed any potential environmental harm from the continued discharge.) Reducing the quantity of the food supply is a

substantial factor warranting enjoining enforcement of Section 599f.

Further, the potential harm from enjoining Section 599f is lessened because, as shown above, California has concurrent jurisdiction to enforce the provisions of the FMIA.

The risk of inhumane treatment to animals is also considered as a significant public interest. As argued by the Humane Society, "[i]f the California Legislature believed that federal law already protected both animal welfare and the public health . . . it would not have amended section 599f in the wake of the HSUS's investigation of Hallmark/Westland." (Doc. 46-4, Humane Society opposition p.23.) California and the defendant intervenors are convinced that absent Section 599f, animals will be inhumanely treated – prodded, poked, kicked to stand and proceed to slaughter. Indeed, these are significant public interest issues which are acknowledged by California's "need to do more" than perceived done in the FMIA and its implementing regulations. This public interest weighs against the issuance of a preliminary injunction enjoining Section 599f.

Again, as shown above, the FMIA and implementing regulations provide for the humane treatment of animals. The Court acknowledges that the enforcement scheme may not extend as far as California and defendant intervenors would prefer. Nonetheless, California is not without statutory authority

to protect animals. California may enforce these federal protections.[2]

Accordingly, in the interest of protecting the quality of the food supply and the quantity of meat processed for human consumption, and because adequate enacted law minimizes the potential risk, the Court finds that the balance of interests weigh in favor of enjoining enforcement of Section 599f against swine slaughterhouses regulated by the Federal Meat Inspection Act.

E. Bond Pursuant to Rule 65

Pursuant to Rule 65, "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."

California has not argued that a bond should be issued for its protection. Indeed, the Court finds that no costs or damages are incurred by California by the issuance of the injunction. Therefore, no bond will be ordered to be posted.

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[2] The Court acknowledges the investigation by the Humane Society in which it uncovered inhumane treatment at a slaughterhouse facility. This Court does not trivialize or disregard the treatment of animals. This conduct, however, is but one of various factors the Court must consider under the law.

CONCLUSION AND ORDER

For the foregoing reasons, the Court finds that a preliminary injunction should issue enjoining enforcement of Section 599f against swine slaughterhouses regulated by the Federal Meat Inspection Act.

IT IS THEREFORE HEREBY ORDERED that the necessary elements for a Preliminary Injunction under Rule 65 of the Federal Rules of Civil Procedure have been satisfied, and Plaintiff's Motion is GRANTED as follows:

Defendants and their agents, servants, employees, officers, representatives, successors and assigns, and all persons, firms, and corporations acting in connection or participation with Defendants or on their behalf, are hereby enjoined and restrained from enforcing California Penal Code § 599f, as amended and effective January 1, 2009, against swine slaughterhouses regulated by the Federal Meat Inspection Act, 21 U.S.C. § 601 *et seq.*

This Order shall be effective upon completion of personal service upon the designated representatives of each of the named defendants.

IT IS SO ORDERED.

Dated: February 19, 2009 **/s/ Lawrence J. O'Neill**
UNITED STATES
DISTRICT JUDGE

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL MEAT ASSOCIATION,

Plaintiff-Appellee,

and

AMERICAN MEAT INSTITUTE,

Plaintiff-intervenor,

v.

EDMUND G. BROWN, in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA,

Defendants-Appellants,

and

THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,

Defendants-intervenors.

No. 09-15483

D.C. No. 1:08-cv-01963-LJO-DLB

ORDER

(Filed May 25, 2010)

NATIONAL MEAT ASSOCIATION,

Plaintiff-Appellee,

and

AMERICAN MEAT INSTITUTE,

Plaintiff-intervenor,

v.

EDMUND G. BROWN, in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA,

Defendants,

and

THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,

Defendants-intervenors-Appellants.

No. 09-15486

D.C. No. 1:08-cv-01963-LJO-DLB

KOZINSKI, Chief Judge:

Plaintiff-Appellee's motion to stay the mandate pending the filing of a timely petition for certiorari is granted. *See* Fed. R. App. P. 41(d)(2).

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL MEAT ASSOCIATION,

Plaintiff-Appellee,

and

AMERICAN MEAT INSTITUTE,

Plaintiff-Intervenor,

v.

EDMUND G. BROWN, in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA,

Defendants-Appellants,

and

THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,

Defendant-Intervenors.

No. 09-15483

D.C. No. 1:08-cv-01963-LJO-DLB

ORDER

(Filed May 18, 2010)

NATIONAL MEAT ASSOCIATION,

Plaintiff-Appellee,

and

AMERICAN MEAT INSTITUTE,

Plaintiff-Intervenor,

v.

EDMUND G. BROWN, in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA,

Defendants,

and

THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,

Defendant-Intervenors-Appellants.

No. 09-15486

D.C. No. 1:08-cv-01963-LJO-DLB

Before: **KOZINSKI**, Chief Judge, **REINHARDT** and **SILVERMAN**, Circuit Judges.

The petition for rehearing and rehearing en banc is denied. *See* Fed. R. App. P. 35, 40.

APPENDIX E

The Federal Meat Inspection Act, 21 U.S.C. § 601, *et. seq.*, provides in relevant part:

§ 602. Congressional statement of findings

Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the States and other jurisdictions as

contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

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§ 603. Inspection of meat and meat food products

(a) Examination of animals before slaughtering; diseased animals slaughtered separately and carcasses examined

For the purpose of preventing the use in commerce of meat and meat food products which are adulterated, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all amenable species before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in commerce; and all amenable species found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other amenable species, and when so slaughtered the carcasses of said amenable species shall be subject to a careful examination and inspection, all as provided by the rules and regulations to be prescribed by the Secretary, as provided for in this subchapter.

(b) Humane methods of slaughter

For the purpose of preventing the inhumane slaughtering of livestock, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of the method by which amenable species are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under this chapter. The Secretary may refuse to provide inspection to a new slaughtering establishment or may cause inspection to be temporarily suspended at a slaughtering establishment if the Secretary finds that any amenable species have been slaughtered or handled in connection with slaughter at such establishment by any method not in accordance with the Act of August 27, 1958 (72 Stat. 862; 7 U.S.C. 1901-1906) until the establishment furnishes assurances satisfactory to the Secretary that all slaughtering and handling in connection with slaughter of livestock shall be in accordance with such a method.

§ 678. Non-Federal jurisdiction of federally regulated matters; prohibition of additional or different requirements for establishments with inspection services and as to marking, labeling, packaging, and ingredients; recordkeeping and related requirements; concurrent jurisdiction over distribution for human food purposes of adulterated or misbranded and imported articles; other matters

Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are

adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

APPENDIX F

The federal regulations from the Food Safety and Inspection Service, Department of Agriculture, 9 C.F.R. § 300, *et. seq.*, provide in relevant part:

9 C.F.R. § 302.3 Livestock and products entering official establishments.

All livestock and all products entering any official establishment and all products prepared, in whole or in part, therein, shall be inspected, handled, stored, prepared, packaged, marked, and labeled as required by the regulations in this subchapter.

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9 C.F.R. § 309.2 Livestock suspected of being diseased or affected with certain conditions; identifying suspects; disposition on post-mortem inspection or otherwise.

* * *

(b) All seriously crippled animals and non-ambulatory disabled livestock shall be identified as U.S. Suspects and disposed of as provided in § 311.1 of this subchapter unless they are required to be classed as condemned under § 309.3. Non-ambulatory disabled livestock are livestock that cannot rise from a recumbent position or that cannot walk, including, but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column, or metabolic conditions.

* * *

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9 C.F.R. § 309.3 Dead, dying, disabled, or diseased and similar livestock.

(a) Livestock found to be dead or in a dying condition on the premises of an official establishment shall be identified as U.S. Condemned and disposed of in accordance with § 309.13.

(b) Livestock plainly showing on ante-mortem inspection any disease or condition that, under Part 311 of this subchapter, would cause condemnation of their carcasses on post-mortem inspection shall be identified as U.S. Condemned and disposed of in accordance with § 309.13.

(c) Any swine having a temperature of 106° F. or higher and any cattle, sheep, goats, horses, mules, or other equines having a temperature of 105° F. or higher shall be identified as U.S. Condemned. In case of doubt as to the cause of the high temperature, or when for other reasons a Program employee deems such action warranted, any such livestock may be held for a reasonable time under the supervision of a Program employee for further observation and taking of temperature before final disposition of such livestock is determined. Any livestock so held shall be reinspected on the day it is slaughtered. If, upon such reinspection, or when not held for further observation and taking of temperature, then on the original inspection, the animal has a temperature of 106° F. or higher in the case of swine, or 105° F. or higher in the case of other livestock, it shall be condemned and disposed of in accordance with § 309.13.

(d) Any livestock found in a comatose or semicomatose condition or affected with any condition not otherwise covered in this part, which would preclude release of the animal for slaughter for human food, shall be identified "U.S. Condemned" and disposed of in accordance with § 309.13, except that such animal may be set apart and held for further observation or treatment under supervision of a Program employee or other official designated by the area supervisor and for final disposition in accordance with this part.

(e) Establishment personnel must notify FSIS inspection personnel when cattle become non-ambulatory disabled after passing ante-mortem inspection. Non-ambulatory disabled cattle that are offered for slaughter must be condemned and disposed of in accordance with § 309.13.

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9 C.F.R. § 309.5 Swine; disposal because of hog cholera.

(a) All swine found by an inspector to be affected with hog cholera shall be identified as U.S. Condemned and disposed of in accordance with § 309.13. Immediate notification shall be given by the inspector to the official in the Veterinary Services unit of the Animal and Plant Health Inspection Service who has responsibility for the control of swine diseases in the State where the swine are located.

(b) All swine, even though not themselves identified as U.S. Suspects, which are of lots in which one or more animals have been condemned or identified as

U.S. Suspect for hog cholera, shall, as far as possible, be slaughtered separately and apart from all other livestock passed on ante-mortem inspection.

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9 C.F.R. § 309.13 Disposition of condemned livestock.

(a) Except as otherwise provided in this part, livestock identified as U.S. Condemned shall be killed by the official establishment, if not already dead. Such animals shall not be taken into the official establishment to be slaughtered or dressed; nor shall they be conveyed into any department of the establishment used for edible products; but they shall be disposed of in the manner provided for condemned carcasses in Part 314 of this subchapter. The official U.S. Condemned tag shall not be removed from, but shall remain on the carcass until it goes into the tank, or is otherwise disposed of as prescribed in Part 314 of this subchapter, at which time such tag may be removed by a Program employee only. The number of such tag shall be reported to the veterinary medical officer by the inspector who affixed it, and also by the inspector who supervised the tanking of the carcass.

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9 C.F.R. § 309.15 Vesicular diseases.

(a) Immediate notification shall be given by the inspector to the local, State, and Federal livestock

sanitary officials having jurisdiction when any livestock is found to be affected with a vesicular disease.

(b) No livestock under quarantine by State or Federal livestock sanitary officials on account of a vesicular disease will be given ante-mortem inspection. If no quarantine is invoked, or if quarantine is invoked and later removed, upon ante-mortem inspection, any animal found to be affected with vesicular exanthema or vesicular stomatitis in the acute stages, as evidenced by acute and active lesions or an elevated temperature, shall be identified as U.S. Condemned and disposed of in accordance with § 309.13.

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9 C.F.R. § 311.1 Disposal of diseased or otherwise adulterated carcasses and parts; general.

(a) The carcasses or parts of carcasses of all animals slaughtered at an official establishment and found at the time of slaughter or at any subsequent inspection to be affected with any of the diseases or conditions named in this part shall be disposed of according to the section pertaining to the disease or condition: Provided, That no product shall be passed for human food under any such section unless it is found to be otherwise not adulterated. Products passed for cooking or refrigeration under this part must be so handled at the official establishment where they are initially prepared unless they are moved to another official establishment for such handling or in the case of products passed for refrigeration are moved for

such refrigeration to a freezing facility approved by the Administrator in specific cases: Provided, That when so moved the products are shipped in containers sealed in accordance with § 318.10(c) of this subchapter or in a sealed means of conveyance as provided in § 325.7 of this subchapter. Owning to the fact that it is impracticable to formulate rules covering every case and to designate at just what stage a disease process or a condition results in adulteration of a product, the decision as to the disposal of all carcasses, organs, or other parts not specifically covered in this part shall be left to the veterinary medical officer. The veterinary medical officer shall exercise his judgment regarding the disposition of all carcasses or parts of carcasses under this part in a manner which will insure that only wholesome, unadulterated product is passed for human food.

* * *

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9 C.F.R. § 313.1 Livestock pens, driveways and ramps.

* * *

(c) U.S. Suspects (as defined in § 301.2(xxx)) and dying, diseased, and disabled livestock (as defined in § 301.2(y)) shall be provided with a covered pen sufficient, in the opinion of the inspector, to protect them from the adverse climatic conditions of the locale while awaiting disposition by the inspector.

* * *

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9 C.F.R. § 313.2 Handling of livestock.

* * *

(d) Disabled livestock and other animals unable to move.

(1) Disabled animals and other animals unable to move shall be separated from normal ambulatory animals and placed in the covered pen provided for in § 313.1(c).

(2) The dragging of disabled animals and other animals unable to move, while conscious, is prohibited. Stunned animals may, however, be dragged.

* * *

APPENDIX G

California Penal Code § 599f. Nonambulatory animals; slaughter houses, stockyards, auctions, market agencies, or dealers; transactions; processing; euthanasia; movement; violations

(a) No slaughterhouse, stockyard, auction, market agency, or dealer shall buy, sell, or receive a nonambulatory animal.

(b) No slaughterhouse shall process, butcher, or sell meat or products of nonambulatory animals for human consumption.

(c) No slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.

(d) No stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

(e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

(f) No person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

(g) No person shall accept a nonambulatory animal for transport or delivery to a slaughterhouse, stockyard, auction, market agency, or dealer.

(h) A violation of this section is subject to imprisonment in a county jail for a period not to exceed one year, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and imprisonment.

(i) As used in this section, "nonambulatory" means unable to stand and walk without assistance.

(j) As used in this section, "animal" means live cattle, swine, sheep, or goats.

(k) As used in this section, "humanely euthanize" means to kill by a mechanical, chemical, or electrical method that rapidly and effectively renders the animal insensitive to pain.

OPPOSITION BRIEF

No. 10-224

In the Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,
Petitioner,

v.

EDMUND G. BROWN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; ARNOLD SCHWARZENEGGER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF CALIFORNIA; STATE OF CALIFORNIA; THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE NON-STATE RESPONDENTS

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held that the National Meat Association ("NMA") was not entitled to a preliminary injunction on its claim that the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. §601 et seq., expressly preempts certain provisions of California Penal Code Section 599f ("§599f"), a statute that prevents the slaughter or abuse of animals too sick, diseased, or injured to stand and walk on their own.

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STATEMENT OF THE CASE

Petitioner National Meat Association ("NMA") sought a preliminary injunction against California Penal Code §599f ("§599f")so that its members can continue to slaughter pigs so sick or injured they cannot stand and walk (often known as "downed" or "nonambulatory" animals), and introduce meat from such animals into the human food supply. Section 599f is an anticruelty law that was amended in the wake of the nation's largest recall of ground beef in 2008. It (1) criminalizes certain treatment, transport, purchase, sale, or receipt of cattle, pigs, sheep, and goats who are too sick, diseased, or injured to stand and walk to slaughter, (2) requires prompt euthanasia to alleviate the suffering of nonambulatory animals, and (3) prohibits the slaughter of nonambulatory animals for human consumption. The Ninth Circuit overturned the district court's grant of the injunction upon determining that §599f is neither expressly nor impliedly preempted by any federal law. Petitioner now seeks review by this Court limited to its express preemption arguments.

The petition does not even attempt to claim a circuit split. Every court of appeals that has considered a similar preemption claim has rejected it. The Ninth Circuit's decision also is perfectly consistent with *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), which interpreted entirely different preemption language that is not at issue in this case. The petition also relies heavily on arguments that were not adequately pressed or passed upon below, and on factual assertions for which petitioner failed to develop any evidence even though it clearly bore the burden of proof in this

interlocutory posture. Nothing about this case merits review by this Court.

1. **California Penal Code §599f**

California Penal Code §599f was originally enacted in 1994 to prevent the inhumane treatment of animals who are too sick or injured to stand and walk. 1994 Cal. Legis. Serv. ch. 600 at 2961. Former §599f contained three prohibitions:

> (a) No slaughterhouse that is not inspected by the United States Department of Agriculture, stockyard, or auction shall buy, sell, or receive a nonambulatory animal.
>
> (b) No slaughterhouse, stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises.
>
> (c) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

Cal. Penal Code §599f (1995). The statute defined "animal" as "live cattle, swine, sheep, or goats," and "nonambulatory" animals as those "unable to stand and walk without assistance." *Id.* §599f(e), (f).

In 2008, the California Legislature amended §599f in response to undercover videos released by the Humane Society of the United States depicting images of sick and disabled cows being dragged by forklifts,

kicked, and electro-shocked on their way to being slaughtered at a federally-inspected slaughter and processing establishment in California. Kathleen Ragan, *Bill Analysis: Paul Krekorian Statement to the California State Assembly Committee on Public Safety in Support of A.B. 2098* at 3 (Apr. 1, 2008), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2051-2100/ab_2098_cfa_20080328_144343_asm_comm.html. The California Legislature responded to these events by amending §599f to extend the restriction on "buy[ing], sell[ing], or receiv[ing]" nonambulatory animals to federally-inspected slaughterhouses, to prohibit the processing, butchering, and sale of meat from nonambulatory animals, and to require the humane handling of those animals. Cal. Penal Code §599f (2009). Petitioner did not oppose the amendment, which was signed into law on July 22, 2008 and became effective January 1, 2009.

As amended, §599f contains seven prohibitions:

(a) No slaughterhouse, stockyard, auction, market agency, or dealer shall buy, sell, or receive a nonambulatory animal.

(b) No slaughterhouse shall process, butcher, or sell meat or products of nonambulatory animals for human consumption.

(c) No slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.

(d) No stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

(e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

(f) No person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

(g) No person shall accept a nonambulatory animal for transport or delivery to a slaughterhouse, stockyard, auction, market agency, or dealer.

Id. The amendment also increased the penalties for a violation of the statute. *Id.* §599f(h). The definitions of "animal" and "nonambulatory" were not amended from former §599f. *Id.* §599f(i)–(j).

2. The Federal Meat Inspection Act

There is no general federal law or regulation preventing cruelty to farm animals. *See* 7 U.S.C. §2132(g) (exempting farm animals from the Animal Welfare Act). The Federal Meat Inspection Act ("FMIA") was enacted to protect the health and welfare of meat consumers, and sets forth requirements that govern certain operations at federally-inspected slaughterhouses. 21 U.S.C. §§602-604. The FMIA contains a narrow express preemption provision that provides:

> Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which

> inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State . . . .

21 U.S.C. §678. Congress also included a broad savings clause inviting states to regulate in related areas, so long as the regulations do not impose "[r]equirements within the scope of this chapter with respect to premises, facilities and operations" of a slaughterhouse. *Id.*; *see also id.* ("This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.").

The Secretary of the U.S. Department of Agriculture ("USDA") administers the FMIA through the Food Safety and Inspection Service ("FSIS"). *See, e.g., id.* §§601, 603; 9 C.F.R. §300.2. Under the FMIA, federal personnel inspect animals before they are slaughtered for human food, 21 U.S.C. §603, a procedure known as "ante-mortem inspection." However, only those animals who are presented for slaughter for human food are within the FMIA's domain. *See Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 554 (7th Cir. 2007), *cert. denied*, 554 U.S. 902 (2008).

During ante-mortem inspection, federal personnel inspect those animals who are "offered for slaughter." 9 C.F.R. §309.1. If a slaughterhouse chooses to present an animal for inspection, federal inspectors may either (1) pass the animal for slaughter, (2) identify the animal as "suspect," or (3) condemn the animal. 9 C.F.R. §§301.2, 309.2; *see also* FSIS, U.S. Department of Agriculture, *FSIS Directive 6100.1* (Apr. 16, 2009), *available at* http://www.fsis.usda.gov/OPPDE/rdad/

FSISDirectives/6100.1Rev1.pdf (*"FSIS Directive 6100.1"*) (regulating procedures for handling nonambulatory cattle). Notably, though, nothing in the FMIA requires a slaughterhouse to present any particular animal for inspection and slaughter. And for cattle, FSIS regulations specifically allow a slaughterhouse to condemn and destroy nonambulatory cattle before inspection. *FSIS Directive 6100.1* at 5.

3. **Proceedings Below**

Petitioner filed this action on December 23, 2008 against the State respondents, requesting injunctive relief and a declaration barring application of §599f to federally-inspected swine slaughterhouses in California. Petitioner argued, *inter alia*, that §599f is preempted by the FMIA as it applies to swine and the processing of pork. The Humane Society of the United States ("HSUS") and other organizations successfully intervened as defendants. On February 19, 2009, the district court granted NMA's motion for a preliminary injunction. Pet.App.53a. The court found that petitioner was likely to succeed in its claim that §599f is expressly preempted because the statute "requires *meat products* to be handled in a manner other than that prescribed by the FMIA or the USDA regulations" and therefore "imposes inspection requirements upon federally inspected slaughterhouses which are in addition to or different than FMIA." Pet.App.36a-37a (emphasis added). The district court also held that §599f is impliedly preempted because the FMIA contains "comprehensive requirements for meat inspection, handling and processing" and §599f "imposes different or additional requirements on

inspection, handling and processing meat."[1] Pet.App.42a. The district court did not reach NMA's separate arguments that §599f violates the dormant commerce clause and/or is unconstitutionally vague. Pet.App.43a.

In an interlocutory appeal, the Ninth Circuit reversed the district court's grant of a preliminary injunction. The Ninth Circuit recognized that petitioner's arguments pertained only to a few subsections of §599f (subsections a-c), Pet.App.17a, and held that those provisions are neither expressly nor impliedly preempted by the FMIA because they do not "require *any* additional or different inspections than does the FMIA," and do not regulate "'premises, facilities and operations' of slaughterhouses" within the scope of the FMIA. Pet.App.11a. Instead, §599f(a)-(c) "regulate[] the kind of animal that may be slaughtered." Pet.App.9a. In addition to a careful analysis of the text and purposes of the FMIA, the Ninth Circuit relied on the existing case law which holds, uniformly, that state statutes prohibiting the slaughter of a particular kind of animal are not preempted by the FMIA. *Id.* (citing *Cavel*, 500 F.3d at 554, and *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326 (5th Cir.), *cert. denied*, 550 U.S. 957 (2007)).

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[1] The district court further held that plaintiffs were likely to succeed on their claim that §599f(e), a humane handling provision, was preempted. Pet.App.39a-40a. The Ninth Circuit agreed with the district court but held that the plaintiffs had not shown that they would be irreparably injured by that provision or that the balance of equities tipped in favor of granting a preliminary injunction against it. Pet.App.16a-17a. The petition does not seek review concerning §599f(e), nor §§(d), (f), or (g).

With respect to petitioner's implied preemption arguments, the Ninth Circuit recognized that it is "not physically impossible to comply with both section 599f and the FMIA" because "nothing in the FMIA *requires* the slaughter of downer animals for human consumption. . . . Whether they may be slaughtered is up to the states." Pet.App.12a-13a. The court further determined that §599f is not an obstacle to federal policy objectives, because the purpose of the FMIA "is certainly not to preserve the slaughter of any kind of animal for human consumption." Pet.App.13a-14a.

The Ninth Circuit remanded for the district court to consider petitioner's vagueness and dormant Commerce Clause arguments. Pet.App.6a n.2, 17a.

REASONS FOR DENYING THE WRIT

The Ninth Circuit determined that a preliminary injunction is unwarranted because petitioner was unlikely to succeed on its claim that §599f(a)-(c) are preempted by federal law. Pet.App.17a. Petitioner asks this Court to review and overturn that interlocutory decision. But the petition identifies no genuine conflict between the Ninth Circuit's decision and any decision of this Court or of any other court, and no legal or practical issue of broad significance that could possibly merit this Court's review. And the supposed public policy issues the petition identifies are unpersuasive and not appropriately preserved for review.

First, petitioner argues that some provisions of §599f are expressly preempted by the FMIA—although petitioner is carefully vague about exactly which provisions it is challenging. Petitioner does not claim a circuit split on this issue, and is forced to concede that the only two prior decisions addressing

analogous state laws held that those laws *were not* preempted by the FMIA. The Ninth Circuit (Pet.App.9a) correctly held that a restriction on the kinds of animals who may be purchased, received, or slaughtered for human consumption is not a "requirement[] within the scope of this chapter with respect to the premises, facilities, and operations" of slaughterhouses within the meaning of the FMIA's express preemption provision, 21 U.S.C. §678. The FMIA provides no requirements for the inspection of animals who will *not* be slaughtered and placed into interstate commerce for human consumption, and is not offended by a state law removing a class of animals from the food production chain entirely. The FMIA simply requires certain food safety inspections to take place *if* meat is to be introduced into interstate commerce. Petitioner's efforts to distinguish *Empacadora* and *Cavel* mischaracterize the text of the laws at issue in those cases, and ignore the reasoning of the Fifth and Seventh Circuits.

The petition tries to establish a conflict with this Court's decision in *Rath Packing*. But *Rath Packing* involved different preemption language in the FMIA not at issue here, and simply held that a law regulating the content of labels on bacon packaging is clearly a "labeling requirement." 430 U.S. at 532. This Court did not hold that every provision (or every preemption provision) of the FMIA must be interpreted "broadly," or that the Act entirely preempts all state regulation possibly affecting meat production.

Second, petitioner invites this Court to grant review in order to hold that the traditional presumption against preemption has no role to play in express preemption cases. That argument was not

pressed or passed upon below, and is a transparent attempt to manufacture an issue worthy of review where there is none. It is inconsistent with *Rath Packing*, where this Court recognized and applied the general "'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 525 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Petitioner's argument is also inconsistent with several subsequent opinions from this Court recognizing that the presumption against preemption applies in express preemption cases. And in any event this case would be a terrible vehicle to explore the proper contours and limits of the presumption against preemption, because the presumption did no real work in the Ninth Circuit's analysis. The Ninth Circuit made clear that it believed petitioner's preemption arguments were clearly inconsistent with the language, structure, and purposes of the FMIA (indeed, "[h]ogwash"), so this was not a borderline case that was in any way dependent on the presumption. Pet.App.9a-10a.

Finally, the petition's policy arguments are unsupported and seriously exaggerated. Since the petition does not attempt to challenge the provisions of §599f prohibiting transportation of, or commerce in, nonambulatory animals, petitioner's preemption arguments could matter, at most, only for the tiny fraction of animals who become nonambulatory in the interval between arriving at the slaughterhouse premises and being slaughtered. There is notably zero evidence in the record about the number of animals in this group. And even for that *de minimis* unquantified subset, this dispute is essentially academic because

§599f(b) effectively removes all commercial incentive to slaughter downed pigs by completely banning the sale of meat from nonambulatory animals for human consumption.

The petition attempts to create the impression of a conflict between federal objectives and §599f(c)'s requirement for prompt euthanasia of nonambulatory animals by suggesting that federal inspectors must have an opportunity to inspect them while they are still alive, in order to detect potential communicable diseases that allegedly could be harder to detect after the animal is euthanized. These arguments depend on factual premises that petitioner utterly failed to develop below. The petition repeatedly references these supposed public health concerns, but does not contain a single relevant citation to the record or decisions below. That is no accident. Petitioner's briefs in the Ninth Circuit vaguely allude to detection of communicable disease as a concern, but they offered no evidence that the California law would pose any significant obstacle to federal objectives in that area. Indeed, in the trial court below, petitioners argued the exact opposite—that pigs pose no real communicable disease dangers and that §599f interferes for no good reason with the supply of meat. *See, e.g.*, Pet.App.49a-51a; Plaintiff National Meat Association's Mem. in Supp. of Mot. for Prelim. Inj. at 23 (Docket No. 20-1) (E.D. Cal. Dec. 30, 2008) (arguing that the balance of harms weighs in favor of the injunction because "NMA is not aware of any reported health issue related to the nonambulatory status of swine").

Even if petitioner's vague and inconsistent intimations about public health problems were persuasive (they are not) these arguments would be

relevant to a theory of "conflict" or "obstacle" preemption that the petition conspicuously does not advance. This Court cannot and should not attempt to grapple with these complex factual issues in the first instance, in an interlocutory posture, when petitioner defaulted on its burden of proof below and has waived the legal argument (conflict preemption) to which these assertions would be most pertinent.

The Ninth Circuit's interlocutory decision is reasonable, consistent with the rulings of two other Circuits on the same issue of law, and of no broad significance. Certiorari should be denied.

I. THE NINTH CIRCUIT'S DECISION IS CORRECT AND DOES NOT CONFLICT WITH THE PRECEDENTS OF THIS COURT OR ANY OTHER CIRCUIT

In the courts below, petitioner advanced a variety of challenges to different provisions of §599f, including implied conflict preemption arguments suggesting that it was impossible for a slaughterhouse to comply with §599f and federal regulations simultaneously, or that §599f stands as an obstacle to the fulfillment of federal objectives. The Ninth Circuit rejected those arguments and petitioner has, tellingly, abandoned them on certiorari—essentially conceding that §599f does not require a slaughterhouse to violate any requirement actually imposed by federal law, and does not significantly frustrate the fulfillment of federal objectives.[2]

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[2] Petitioner's *amici* continue to press the contention that §599f requires slaughterhouses to violate federal law and that it is impossible to comply with both simultaneously. Brief of *Amici Curiae* Association of Swine Veterinarians and National Pork

Although the petition includes some purported public policy concerns for atmospheric effect, the only legal argument it raises is a contention that certain provisions of §599f are expressly preempted by the FMIA, which prohibits states from imposing "[r]equirements within the scope of this chapter with respect to premises, facilities and operations of any [federally-inspected slaughterhouse] . . . which are in addition to, or different than those made under this chapter." 21 U.S.C. §678. The Ninth Circuit's decision rejecting that argument is correct and fully consistent with the decisions of this Court and of every court of appeals that has interpreted the same statutory preemption language, and does not merit review.

A. Section 599f Is Not Expressly Preempted

Petitioner contends that "[t]he FMIA and its implementing regulations expressly and comprehensively govern slaughterhouse 'operations' concerning nonambulatory swine from the moment they arrive at or become nonambulatory on federally-inspected slaughterhouse 'premises,'" Pet.25, and that §599f is preempted because "once [swine are] on federally-regulated slaughterhouse grounds, federal law is to set the sole standards," Pet.35. Petitioner argues, in other words, that §599f is preempted because *any* law regulating conduct occurring on the "grounds" or "premises" of a slaughterhouse is necessarily preempted by §678.

That argument suffers from several fatal defects, including that most if not all of §599f's requirements

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Producers' Council at 2-4, 10-11. If that argument had any merit (it does not), the fact that the petition has waived it would be reason enough to deny certiorari in this case.

regulate activities clearly occurring outside the slaughterhouse premises. Petitioner seems to concede as much for §§(d), (f), (g) and much of (a), which prohibit actors *other than slaughterhouses* from buying, selling, receiving or transporting nonambulatory animals. The petition does not argue that those prohibitions are preempted, and they obviously are not—unless §678 somehow is read to preempt the entire field of state regulation of agricultural animals.

The dispute in this case thus centers around what the court of appeals called the "receipt and slaughter" provisions in §599f(a) and (b), and the humane euthanasia requirement in §(c). The first two sections do not regulate operations inside slaughterhouse premises at all, and certainly are not within the scope of what the FMIA itself regulates. As the Ninth Circuit recognized, §§(a) and (b) just remove a particular class of animals from the human food production chain entirely. Three circuits have now held that laws of that nature fall outside the FMIA's preemption provision. Section (c) does regulate inside the slaughterhouse premises, but it too is entirely outside the scope and purposes of the FMIA and therefore is not preempted.

1. Subsections (a) and (b) Are Not Preempted as to Pig Slaughterhouses Because States Can Ban Certain Animals from Ever Entering the Food Supply

Section 599f(a) provides in full: "No slaughterhouse, stockyard, auction, market agency, or dealer shall buy, sell, or receive a nonambulatory animal." Section 599f(b) provides: "No slaughterhouse shall process,

butcher, or sell meat or products of nonambulatory animals for human consumption."

As the Ninth Circuit correctly held, these provisions do not attempt to regulate the inspection and slaughter process inside the slaughterhouse; they "regulate[] the kind of animal that may be slaughtered." Pet.App.9a. Section (a) prevents nonambulatory animals from entering the premises at all, and §(b) limits what can be done with body parts derived from nonambulatory animals. As the Ninth Circuit explained, "[t]he FMIA establishes inspection procedures to ensure animals that are slaughtered are safe for human consumption, but this doesn't preclude states from banning the slaughter of certain kinds of animals altogether." *Id.* "Federal law regulates the meat inspection process; states are free to decide which animals may be turned into meat." Pet.App.10a.

The Ninth Circuit's holding is consistent with the reasoning of both courts of appeals that have addressed similar laws banning the slaughter of certain animals for humane reasons. This Court declined to review both decisions.

In *Empacadora*, the Fifth Circuit held that state laws prohibiting slaughterhouses from processing horse meat were not preempted by §678 because "the FMIA does not expressly dispose states of the ability to define what meats may be available for slaughter and human consumption." 476 F.3d at 333. The court recognized that the preemption clause is "naturally read as being concerned with the methods, standards of quality, and packaging that slaughterhouses use" rather than limiting "states in their ability to regulate what types of meat may be sold for human consumption in the first place." *Id.* And in *Cavel*, the Seventh

Circuit similarly held that the "[FMIA] is concerned with inspecting premises at which meat is produced for human consumption, see, e.g., 21 U.S.C. §606, rather than with preserving the production of particular types of meat for people to eat." *Cavel*, 500 F.3d at 554 (citing *Empacadora*, 476 F.3d at 333). The court recognized that "in a literal sense a state law that shuts down any 'premises facilities and operations'" of a slaughterhouse "is 'different' from the federal requirements for such premises," but dismissed such a literal reading as "untenable" because it would preempt state laws that clearly fall outside the scope of the FMIA. *Id.* The court reasoned that while any horse meat that is produced must comply with the FMIA, if horse meat is not produced, "there is nothing, so far as horse meat is concerned, for the [FMIA] to work upon." *Id.*

Petitioner appears to concede that the statutes upheld in *Empacadora* and *Cavel* are not preempted, but argues that they are distinguishable because under those laws horses "are never allowed to enter federally-regulated slaughterhouse premises for slaughter, and such laws thus do not in any way alter the federal rules governing what is to occur *inside* those establishments." Pet.34; *see also id.* ("Such state laws . . . ban *all* horses from even entering the federal premises at all."). Petitioner mischaracterizes the laws upheld in *Empacadora* and *Cavel*. The Illinois law in *Cavel* made it unlawful "to slaughter a horse if that person knows or should know that any of the horse meat will be used for human consumption." 225 Ill. Comp. Stat. §635/1.5(a). The Texas law in *Empacadora* made it unlawful to "sell[], offer[] for sale, or exhibit[] for sale horsemeat as food for human consumption," or

to "possess[] horsemeat with the intent to sell the horsemeat as food for human consumption." Tex. Agric. Code Ann. §149.002.

Those laws are not meaningfully different from §599f. If anything, §599f is *more clearly* a law preventing nonambulatory animals from "entering the federal premises at all," Pet.34, than the laws at issue in either *Empacadora* or *Cavel*. Unlike those laws, §599f(a) expressly prohibits slaughterhouses from "receiv[ing]" any nonambulatory animal in the first place. Section 599f(b) does also provide that no slaughterhouse shall "process, butcher, or sell meat or products of nonambulatory animals for human consumption," but that wording is not materially different than the Illinois law in *Cavel* and in context is just another way of removing nonambulatory animals from the human food production system altogether. Just as in *Empacadora* and *Cavel*, §599f(a) and (b) create a blanket prohibition on using an entire class of animals for human food. They do not regulate the treatment, handling, or inspection of animals who will be slaughtered for food, nor do they affect the operations or premises of the slaughterhouses, which can continue business as usual with respect to all other categories of animals.

There also is no support in either *Cavel* or *Empacadora* for petitioner's reductionist theory that once "inside" the premises of a slaughter facility state laws can have no force whatsoever. While it is undisputed that the FMIA does not regulate the handling, transport and sale of animals which occurs outside of slaughterhouses, it plainly does not follow from this that everything that occurs inside a federally inspected slaughterhouse is somehow immune from

state regulation. It cannot be, and is not, correct that every law regulating what happens inside federally inspected slaughterhouse grounds is preempted. A wide range of state laws—such as state building codes, workplace safety requirements, and general criminal laws—regulate operations inside slaughterhouses and, thus, would fall prey to petitioner's overbroad preemption analysis. Petitioner's argument would suggest that no state law could prevent a slaughterhouse from chaining workers to slaughter equipment for 100 hours a week, because such a law would regulate "operations" "inside" the facility.

A sensible interpretation of §678 must preserve some scope of operation for §678's express *savings* clause, and must incorporate both the "premises, facilities, and operations" language and the limitation that state law requirements are preempted only if they are "within the scope of" the FMIA, in light of the bedrock principle that the proper "understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 530 n.27 (1992) (opinion of Stevens, J.)). The FMIA's purpose is to protect consumers "by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. §602; *see also Pittsburgh Melting Co. v. Totten*, 248 U.S. 1, 4-5 (1918) (stating that the FMIA seeks "to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products in interstate and foreign commerce"). As the Fifth and Seventh Circuits have recognized, the FMIA's "scope" is a system of requirements for the

inspection of animals who are to be slaughtered and sold for food in interstate commerce. A state law thus is "within the scope of" the FMIA only if it imposes additional or different requirements relating to the inspection or slaughter of animals who will be used to produce meat and meat products.

To the extent §§(a) or (b) of §599f can be characterized as indirectly regulating activities inside a federally inspected slaughterhouse, none of the protections provided by those subsections is "within the scope" of the FMIA. As the Seventh Circuit squarely held in *Cavel*, a law like §599f(b) specifying which animals may be slaughtered for human consumption removes those animals entirely from the FMIA's purview. And petitioner identifies no provision of the FMIA which regulates in any way whether or how a slaughterhouse may "receive" a nonambulatory animal. Instead the petition only musters that "Section 599f(a)'s ban on the mere receipt of nonambulatory animals will require swine slaughterhouses to change their federally-sanctioned procedures for accepting swine." Pet.32. Yet the petition cites no provisions of the FMIA or record evidence establishing that there *are* any specific "federally-sanctioned procedures" governing receipt of pigs by slaughterhouses.[3] And the declarations submitted below concerning the usual operations at a single pig slaughterhouse do nothing to support the

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[3] In fact, federal inspectors are only at the slaughterhouses at specified times and may be entirely absent when animals arrive. *See* 9 C.F.R. §307.4 (schedule of operations for inspection); *see also id.* §311.27 (describing special procedures when an animal must be slaughtered "at night or on Sunday or a holiday when the inspector cannot be obtained").

narrow express preemption theory advanced by petitioner here.

The petition argues that a law making an entire species off limits from slaughter for meat production is different from a law that only takes *particular kinds of animals* out of the food production chain. But nothing in the FMIA suggests or supports a distinction between species-level laws like the ones at issue in *Empacadora* and *Cavel*, and finer-grained laws like §599f or, say, a requirement that only grass-fed cattle or free-range chickens may be slaughtered for food. *See* Pet.App.10a (suggesting other possibilities). Petitioner offers no coherent way to draw the lines its argument would require. The petition makes much of the Ninth Circuit's acknowledgment that "[i]t is possible that a state may go too far" and attempt to invade the FMIA's scope with detailed inspection requirements masquerading as restrictions on what kinds of animals may be slaughtered. The Ninth Circuit properly reserved those questions for another day, and recognized that *this* law is not inappropriately gerrymandered in that fashion. Section 599f "does not duplicate federal procedures" and "doesn't require *any* additional or different inspections than does the FMIA." Pet.App.11a.

2. Subsection (c) is Not Preempted as to Pig Slaughterhouses Because States Can Criminalize Cruelty to Animals Who Will Not Be Slaughtered for Interstate Commerce

Petitioner's arguments seem to be directed principally at §599f(c), which provides that "[n]o slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal." Subsection (c) has little if any practical significance, since other provisions of §599f prevent nonambulatory animals from arriving at the slaughterhouse at all and eliminate any financial incentive for slaughterhouses to process them into meat for human consumption. *Supra* at 12. Thus, this subsection can only operate where a slaughterhouse would otherwise go to the time and expense of processing a nonambulatory pig through federal inspection, despite lacking any lawful market for its sale.

In any event, §(c) governs only the handling of animals who will not enter the food supply, and humanely euthanizing such animals is entirely consistent with and outside the scope of the FMIA. The Ninth Circuit correctly held that §599f(c) merely requires slaughterhouses to take certain animals out of the food production chain entirely—and therefore is just like the state laws declaring that horses (or any other specific kind of animal) cannot be slaughtered for human consumption at all. This was part of the foundation for the Ninth Circuit's holding that "states are free to decide which animals may be turned into meat." Pet.App.10a.

The petition labors to convey the impression that §599f(c) somehow conflicts with federal provisions requiring ante-mortem inspections of nonambulatory animals. But the provisions petitioner cites refer to the ante-mortem inspection that animals must undergo if, and only if, they are presented for inspection in order to be slaughtered for human consumption. *See, e.g.*, 21 U.S.C. §603(a) (establishing "examination and inspection" of animals who "are to be slaughtered and the meat and meat food products thereof are to be used in commerce"); 9 C.F.R. §309.1 ("[A]nte-mortem inspection shall be made . . . before the livestock shall be allowed to enter into any department of the establishment *where they are to be slaughtered*" (emphasis added)).

FMIA regulations make ante-mortem inspection of livestock *to be slaughtered for meat* mandatory, but federal law does not mandate that any particular animal must be presented for inspection and subsequently slaughtered for meat. There is no affirmative federal requirement that a slaughterhouse must present an animal for inspection when it will not be slaughtered, and the only USDA guidance documents on the subject (addressing cattle) are expressly to the contrary. *See FSIS Directive 6100.1* at 5 (allowing establishment to "condemn and humanely destroy the non-ambulatory, disabled cattle" rather than present them for inspection); FSIS, *Questions and Answers FSIS Directive 6100.1* at 11 (Addendum to Defendant-Intervenors' Br. (9th Cir. Apr. 6, 2009)) ("[T]he establishment may elect to humanely euthanize livestock and dispose of the carcasses without presenting them for FSIS inspection.").

Accordingly, the Ninth Circuit recognized, the FMIA does not impose any requirements relating to whether particular classes of animals *must* be slaughtered for food. Pet.App.12a. That is why the court below rejected petitioner's implied preemption argument, which was based on the contention that it was impossible to comply with §599f and federal law simultaneously. *Id.* It is also why petitioner has abandoned that argument on certiorari. A law requiring that nonambulatory animals must be excluded from the human food supply, by euthanization at slaughterhouses, is no more "within the scope" of the FMIA than the part of §599f prohibiting the transport of such animals, or the part of §599f requiring that they must be euthanized by ranchers or veterinarians far from the slaughterhouse. Were it otherwise, as petitioner contends, both laws at issue in *Empacadora* and *Cavel* would have been struck down. *Supra* at 19-22.

3. FSIS Has Not Rejected Regulatory Proposals Similar to §599f

The petition's suggestion (Pet.14) that FSIS has rejected regulatory proposals similar to §599f is irrelevant and wrong. "[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated," *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983), but a decision not to regulate is evidence of federal intent to preempt state regulations only if the relevant federal entity "convey[s] an 'authoritative' message" that there is a federal policy against such regulations. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 67 (2002). That would be an implied preemption argument, but the petition

abandons any such arguments and does not even attempt to make the necessary showing that FSIS has conveyed any such message. Nothing in the FSIS review cited by petitioner conveys an "authoritative" determination inconsistent with §599f. *See* Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-Mortem Inspection, 74 Fed. Reg. 11,463, 11,463 (Mar. 18, 2009). To the contrary and consistent with §599f, the FSIS regulation bans the slaughter for human consumption of nonambulatory cattle. 9 C.F.R. §309.3(e) ("Non-ambulatory disabled cattle that are offered for slaughter must be condemned and disposed of in accordance with §309.13."). Although FSIS decided not to require the immediate euthanization of nonambulatory swine, its decision in no way addressed the substantive reasons for such a decision—merely stating that it was "[an] issue . . . outside the scope of this rulemaking." 74 Fed. Reg. at 11,464.

B. The Ninth Circuit's Decision Is Consistent With This Court's Decision in *Jones v. Rath Packing Co.*

Petitioner attempts to claim a conflict with this Court's decision in *Rath Packing*, and argues that *Rath Packing* mandates a "broad reading" of the FMIA's preemption provisions. But that decision is fully consistent with the Ninth Circuit's conclusion that §599f is not preempted by the FMIA.[4]

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[4] Petitioner also cites *Armour & Co. v. Ball*, 468 F.2d 76, 84-85 (6th Cir. 1972), *cert. denied*, 411 U.S. 981 (1973), for this proposition. Armour also deals with state labeling requirements for meat that were preempted by express preemption provision of the FMIA regarding labeling, and is distinguishable on the same grounds as *Rath*.

The *Rath Packing* Court applied established preemption principles to determine that the state law in that case was preempted by *different* preemption language in the FMIA that is not at issue here. In addition to the preemption clause addressed by the petition, the FMIA separately prohibits states from enforcing "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter." 21 U.S.C. §678. *Rath Packing* applied *that* preemption clause to state laws requiring that certain information must be placed on bacon packaging. 430 U.S. at 532. This Court held, unsurprisingly, that "[i]t twists the language beyond the breaking point to say that a law mandating that labeling contain certain information is not a 'labeling requirement.'" *Id.* Nothing in *Rath Packing* discusses the preemption language at issue here, or suggests that courts must read all provisions of the FMIA "broadly," and certainly not beyond their actual textual scope. This Court just cautioned against ascribing an absurdly "restrictive meaning ... to the phrase 'labeling requirements.'" *Id.* The state law at issue in that case also conflicted with a federal requirement directly on point. *Id.* at 531-32 ("[T]he state law's requirement—that the label accurately state the net weight, with implicit allowance only for reasonable manufacturing variations—is 'different than' the federal requirement, which permits manufacturing deviations *and* variations caused by moisture loss during good distribution practice."). *Rath Packing*'s holding is limited to the specific and highly factbound issues presented there, which can have no impact on this case.

Petitioner also wrongly suggests that *Rath Packing* did not apply any "presumption against preemption."

Pet.21-23. Petitioner is playing a murky game of semantics at best. This Court began its preemption analysis in *Rath Packing* with the traditional rule that

> [w]here, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

430 U.S. at 525 (internal citations and quotation marks omitted). This Court then held that Congress's preemptive purpose was "clear and manifest" with respect to the state *labeling* requirements at issue in that case. In this case, the Ninth Circuit correctly determined that Congress had not evinced any such "clear and manifest purpose" requiring preemption of the relevant provisions of §599f. That decision in no way conflicts with the holding in *Rath Packing*.

II. REVIEW IS NOT WARRANTED TO ADDRESS ABSTRACT ISSUES CONCERNING WHEN OR HOW THE PRESUMPTION AGAINST PREEMPTION APPLIES

Petitioner argues that certiorari should be granted to resolve supposed confusion over the proper application of the presumption against preemption to statutes containing express preemption provisions, such as the FMIA. The petition greatly overstates the extent of any such confusion, and regardless this case would not be an appropriate vehicle to attempt any grand transformation or reconciliation of the preemption case law.

A. This Case Is Not An Appropriate Vehicle To Reconsider The Presumption Against Preemption

The petition argues that the traditional presumption against preemption should play no role in the interpretation of express preemption clauses, and that there is some confusion in this Court's case law and in the lower courts on that issue. Even if those arguments had any merit (which they do not), this would not be an appropriate case to review them for two reasons.

First, these arguments were neither pressed nor passed upon below. Even though California's opening brief on appeal clearly argued that "[t]here is a strong presumption against federal preemption," petitioner's responsive brief did not challenge that contention or advance the argument for which it now seeks review. State Appellants' Opening Br. at 18 (9th Cir. Apr. 3, 2009). The Ninth Circuit's opinion dutifully recites the presumption against preemption without recognizing any dispute between the parties (or in the case law) about its application, and without any substantive analysis of whether that presumption should apply differently in express preemption cases. Pet.App.7a. This Court "[o]rdinarily . . . does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (refusing to consider arguments not pressed by petitioner below).

Second, the Ninth Circuit did not consider the statutory interpretation question at the heart of this case to be a close one. It described petitioner's arguments as "[h]ogwash," and noted that those

arguments are inconsistent with the decisions of every circuit that has interpreted the FMIA preemption provision at issue here. Pet.App.9a-10a. Although the Ninth Circuit recited the traditional presumption against preemption, that presumption did no real work in its analysis—which was entirely based on the clear import of the language and purposes of the FMIA. Pet.App.9a-11a. That court's ultimate resolution of the express preemption issue came down to the following:

> California's prohibition of the slaughter of nonambulatory animals does not duplicate federal procedures; it withdraws from slaughter animals that are unable to walk to their death. This prohibition doesn't require *any* additional or different inspections than does the FMIA, and is thus not a regulation of the "premises, facilities and operations" of slaughterhouses.

Pet.App.11a. Because the Ninth Circuit's determination that §599f was not preempted would have been the same regardless of whether or not the court applied a presumption against preemption, this case would not be a promising vehicle for this Court to explore or clarify the proper scope and application of the presumption.

B. The Petition Greatly Overstates Any Confusion In Existing Preemption Case Law

In any event, the petition is wrong to suggest that this Court's recent cases have been inconsistent or that there is any meaningful confusion in the lower courts concerning these issues.

Petitioner relies heavily on Justice Thomas's dissent in *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008), which noted that the force of the presumption

has "waned" in recent express preemption cases, some of which have been decided without reference to the presumption. *Id.* at 556 (Thomas, J., dissenting). But this Court has never held that the presumption has no role to play in express preemption cases; it has, recently and repeatedly, held the opposite. In *Altria* itself this Court invoked the presumption against preemption in interpreting an express preemption provision, explaining that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Id.* at 543 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)); *see also Medtronic, Inc.*, 518 U.S. at 485-86. While the text of a statute obviously controls any express preemption inquiry, the presumption against preemption still applies when the text is inconclusive.

Cuomo v. Clearing House Ass'n, 129 S. Ct. 2710 (2009), is not to the contrary. In that case, this Court held that the express preemption provision of the National Banking Act limited only the states' supervisory powers over corporations and did not preempt a state attorney general's ability to enforce state law. Contrary to petitioner's assertion, this Court did not state that the presumption against preemption did not apply; rather, the majority found the plain terms of the statute so clear that it was unnecessary to rely on the presumption in finding that the challenged state action was not preempted. *Id.* at 2720 ("We have not invoked the presumption against pre-emption, and think it unnecessary to do so in giving force to the plain terms of the National Bank Act."). This Court refrained from applying the presumption because, like here, the text of the express preemption

clause was not "susceptible of more than one plausible reading." *Altria Group, Inc.*, 129 S. Ct. at 543.

There also is no conflict or confusion in the courts of appeals. Petitioner juxtaposes a laundry list of circuit cases holding that a presumption against preemption applies in the context of express preemption clauses with other cases that purportedly "limit its reach" by recognizing that the presumption can be overcome by clear statutory language. Pet.29-30. That is no conflict; it reflects the proper application of the principle explained in *Altria* that the presumption only comes into play where an express preemption clause is "susceptible of more than one plausible reading." Although petitioner suggests that the presumption sometimes is "wholly ignored" in express preemption cases, the only case it cites, *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010), itself a Ninth Circuit case, does not clearly reject a role for the presumption in express preemption cases. In *Chae*, the Ninth Circuit merely analyzed the nature of the plaintiffs' state law claims and determined that the text of various federal express preemption provisions preempted some of those claims. *Id.* at 942-43.[5]

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[5] There is no reason to hold this case pending resolution of the two express preemption cases currently on this Court's docket. No party has argued in either case that the presumption against preemption should not apply in express preemption cases. *See Bruesewitz v. Wyeth*, No. 09-152 (argued Oct. 12, 2010), and *Chamber of Commerce v. Whiting*, No. 09-115 (argued Dec. 8, 2010).

III. THE PETITION'S PUBLIC POLICY ARGUMENTS ARE UNPERSUASIVE AND NOT APPROPRIATELY PRESERVED OR PRESENTED FOR REVIEW

Unable to claim a circuit split or even credible confusion as to any broadly applicable legal principles, the petition tries to suggest that the Ninth Circuit's decision somehow implicates issues of great national importance. These arguments are unpersuasive and not appropriately preserved or presented for review.

The petition suggests that review is necessary to preserve the "uniformity" of the federal slaughterhouse inspection regime. But petitioner's uniformity claim is a fiction; slaughterhouses are already subject to differing state regulations as to many aspects of their operations unrelated to the inspection process, including worker safety, environmental protection, and zoning. The fact that a handful of slaughterhouses in California may have to euthanize a few more nonambulatory pigs than they already do will not disrupt any important national policies. This case does not, for example, implicate the common concern in preemption cases that state regulation of a nationally distributed manufactured good will disrupt the market or end up setting a *de facto* national standard. Section 599f also has required for nearly two decades that slaughterhouses either euthanize nonambulatory animals or remove them from the premises. *See* 1994 Cal. Legis. Serv. ch. 600 at 2961; *supra* at 1-2. The recent amendments eliminate the removal option, but for purposes of petitioner's preemption arguments that change is inconsequential. The statutory regime in California has, therefore, been

inconsistent with petitioner's arguments for sixteen years without producing any disruption of the federal scheme.

As discussed above, petitioner also makes no argument challenging the provisions of §599f that apply outside the slaughterhouse and to non-slaughterhouse actors. Section 599f contains many different prohibitions, some new and some old, each of which regulates different conduct, and each of which clearly avoids the FMIA's preemptive scope. Most of its provisions would stand even under petitioner's preemption theory—unless petitioner wishes to adopt a theory of preemption far more sweeping than the petition admits. Those provisions prevent anyone from transporting a nonambulatory animal or selling it to a slaughterhouse, and prevent slaughterhouses from receiving such animals in the first place. *See* Cal. Penal Code §599f(a), (d), (f), (g). Even if petitioner were correct that federal law displaces all state regulation of what goes on "*inside*" a slaughterhouse, *e.g.*, Pet.34-35, its arguments therefore would be significant only as applied to the extremely small and wholly unquantified subset of animals who can walk into the slaughterhouse but become nonambulatory in the interval between receipt and slaughter. And even as to those animals, §599f(b)'s prohibition against the later *sale* of meat and meat products derived from nonambulatory animals means that slaughterhouses will have no incentive to process such animals through federal inspection in any event. So it is not clear that the limited preemption claims advanced in the petition would have any practical significance for slaughterhouse operations at all.

In any event, compliance with §599f also will not disrupt the federal inspection process in any way. Slaughterhouses nationwide do not come into conflict with the federal inspection regime when they voluntarily elect to euthanize nonambulatory animals rather than present them for inspection, as is their right. Compliance with §599f will be no more disruptive. If anything, a rule automatically removing nonambulatory animals from the federal inspection process will remove a burden on federal inspectors and thereby make that process run more smoothly.

The petition's principal argument that this case raises issues of national importance rests on the suggestion, woven throughout, that by removing nonambulatory animals from the federal ante-mortem inspection process §599f will make it harder for federal officials to detect and track communicable diseases. These arguments are not appropriately preserved or presented. Petitioner's briefing below alludes to these concerns in a few short and conclusory passages, *e.g.*, Appellee's Br. at 41 n.8, 44-45 (9th Cir. May 1, 2009), but the Ninth Circuit obviously did not believe that petitioner was pressing a serious argument along these lines and stated that "[n]othing in the record substantiates this concern." Pet.App.15a n.7. Indeed, petitioner has completely changed its tune to sing its song to this Court. In the district court, its primary policy argument below was that §599f interferes with the supply of meat for no good reason because meat from pigs poses no real communicable disease dangers. *Supra* at 13-14. Now, petitioner's primary policy argument is that §599f interferes with the detection of diseases in those same pigs—an argument it did not clearly advance in support of its motion for a

preliminary injunction and that finds no support in the record.

Further, petitioner failed to submit *any* evidence to the courts below—much less develop an adequate factual record—regarding the alleged importance of ante-mortem inspections of animals who will not be processed for meat. *See Lawn v. United States*, 355 U.S. 339, 354 (1958) ("[W]e must look only to the certified record in deciding questions presented."). Petitioner claims that systematic ante-mortem inspection of nonambulatory animals is "the primary process by which serious communicable diseases are first detected," Pet.4, and that the elimination of ante-mortem inspection "greatly increase[s] the risk that serious communicable diseases will not be timely detected or addressed." Pet.13. But the petition does not provide a single citation to the record or the decisions below for these assertions. As the Ninth Circuit recognized, there is no evidence in the record indicating that ante-mortem, rather than post-mortem, inspection is necessary for detecting or diagnosing any diseases in swine or other livestock. Pet.App.15a n.7. Respondents dispute these assertions, and if such evidence had been presented respondents would have been entitled to contest it and would have done so vigorously.

Petitioner certainly bore the burden of developing the record necessary to support its arguments that it is likely to succeed on the merits for preliminary injunction purposes. This Court should not accept review at this time, in an interlocutory posture, to consider untested factual assertions that lack any support in the record—particularly when petitioner has strategically chosen not to pursue the conflict

preemption arguments to which these factual claims would be most relevant. If these public health claims have any merit at all, they should be evaluated in a case where both sides have had the opportunity to develop the necessary facts in the courts below and where the petitioner has not waived the relevant legal arguments.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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OPPOSITION BRIEF

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In The Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

EDMUND G. BROWN JR., in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA; THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether California's prohibition against slaughterhouses receiving and slaughtering nonambulatory swine for human consumption is preempted by the Federal Meat Inspection Act, which regulates certain aspects of the meat inspection process.

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INTRODUCTION AND SUMMARY OF REASONS TO DENY THE PETITION

Respondents oppose the petitioner's request for certiorari. Petitioner alleges no circuit split on any of the issues raised in the petition. Petitioner does argue that the Ninth Circuit's approval of California's law prohibiting introduction of nonambulatory livestock into the food supply is a "radical expansion" of cases out of the Fifth and Seventh Circuits, but this overstates the differences among the cases, and overlooks that all three circuits reached the same conclusion that state laws prohibiting processing of certain types of meat are not preempted by the Federal Meat Inspection Act.

Additionally, contrary to petitioner's argument, there is no conflict with *Jones v. Rath Packing Co.*, 430 U.S. 519, 530-31 (1977), which interpreted different preemption provisions. And, the Ninth Circuit decision in this case properly applies the general standard set in *Rath Packing*. Nor is there any confusion as to when or how to apply the presumption against preemption, as alleged by petitioner. The presumption against federal preemption, is especially well-established where the state law involves the state's police power over health and safety. The Ninth Circuit properly applied the law when it determined that California's prohibition against processing nonambulatory livestock for human consumption is valid and not preempted by federal law.

Nor was petitioner's action below a case of extraordinary national importance, as there has been very little litigation regarding application of *Jones v. Rath Packing Co.* in the last thirty years. There is nothing in the record to support petitioner's argument of an "immediate risk to human health and safety" from the ruling. In fact, all evidence is to the contrary, that the California law that was upheld *addresses and potentially resolves* a health risk.

Even if there were a valid traditional argument for review, this case would be a poor vehicle by which to address the preemption issues petitioner asserts, because the case comes to this Court on a preliminary injunction ruling, and several of the arguments made by petitioner revolve around factual issues that are not fully addressed in the evidentiary record. Perhaps after further time in the trial court, the evidentiary context would be better developed. At the present time, it is at best premature to consider this case.

Finally, many of the issues raised by petitioner as reasons for review focus on the merits of this case. But the Ninth Circuit correctly decided the preliminary injunction motion, and there is nothing in the record, or in the petition, to warrant review by this Court.

STATEMENT OF THE CASE

A. California Penal Code Section 599f

In January 2008, the Humane Society of the United States released an undercover video of a California slaughterhouse. Appendix (App.) A at p. 4a. The video depicted images of sick and disabled cows ("downer" or "nonambulatory animals") being dragged by forklifts, kicked, and electro-shocked on their way to slaughter. *Id.* "Public health professionals warned that meat from "downer" cows was more likely to be diseased, partly because animals can become non-ambulatory due to disease and partly because downer animals grow sicker as they end up rolling around in other animals' refuse." *Id.* Upon further investigation, it was discovered that the meat from these cows had been processed and had entered the food supply. Subsequent to the video's release, the largest beef product recall in the history of the United States took place due to the risks posed by this meat, deemed by the USDA as unfit for consumption. *Id.*; *see also* 9 C.F.R. §§ 309.2, 309.13.

"Public health professionals have long warned that meat derived from downed animals has a much increased susceptibility to passing on the E. coli virus, mad cow disease, and salmonella – all of which can lead to severe human health complications and even death." Paul Krekorian Statement to the California State Assembly Committee on Public Safety; Arguments in Support of Assembly Bill 2098 at p. 3 (April 23, 2008). 143 million pounds of beef had been

processed and sold by the plant, 37 million pounds of which had been distributed to school lunch programs. *Id.* Assembly Bill 2098 (AB 2098), a bill to amend section 599f of the California Penal Code, was introduced to prohibit the purchasing, slaughter, and sale of nonambulatory animals for consumption. The bill provided that a violation of these provisions would be punishable by imprisonment for up to a year and a fine of no more than $20,000. *See* Cal. Penal Code § 599f (West 2009).

The bill amended section 599f to provide in particular:

> (a) No slaughterhouse, stockyard, auction, market agency, or dealer shall buy, sell, or receive a nonambulatory animal.
>
> (b) No slaughterhouse shall process, butcher, or sell meat or products of nonambulatory animals for human consumption.
>
> (c) No slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.
>
> (d) No stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.
>
> (e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal

may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

(f) No person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

(g) No person shall accept a nonambulatory animal for transport or delivery to a slaughterhouse, stockyard, auction, market agency, or dealer.

(h) A violation of this section is subject to imprisonment in the county jail for a period not to exceed one year, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and imprisonment.

(i) As used in this section, "nonambulatory" means unable to stand and walk without assistance.

(j) As used in this section, "animal" means live cattle, swine, sheep, or goats.

(k) As used in this section, "humanely euthanized" means to kill by a mechanical, chemical, or electrical method that rapidly and effectively renders the animal insensitive to pain.

The purpose of AB 2098 was to strengthen California's ability to protect people, people's health, the

food supply and animals. Paul Krekorian Statement to the California State Assembly Committee on Public Safety; Arguments in Support of Assembly Bill 2098 at p. 3 (April 23, 2008). AB 2098 was supported by the Humane Society of the United States, the Humane Farming Association, California Cattlemen's Association, State Humane Association of California, the American Society for the Prevention of Cruelty to Animals, and the California Federation for Animal Legislation. *Id.* at p. 2. The California District Attorneys Association also supported AB 2098. There was no registered opposition. Petitioner did not oppose the statute on the record. *Id.* The measure was signed into law on July 22, 2008 and would have become effective January 1, 2009.

Shortly before amended section 599f was to take effect, petitioner filed suit in federal district court against the State of California, Attorney General Brown and Governor Schwarzenegger, seeking declaratory and injunctive relief barring the application of section 599f to federally inspected swine slaughterhouses.[1] *Id.* App. A at p. 5a. Petitioner argued that section 599f is preempted by the Federal Meat Inspection Act ("FMIA"), violates the dormant commerce clause and is unconstitutionally vague. The district court entered a preliminary injunction

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[1] The American Meat Institute successfully intervened as a plaintiff as well, but did not join in or file a motion for preliminary injunction and was not a party to the appeal in the Ninth Circuit or this petition for certiorari.

on preemption grounds. The State Defendants filed an interlocutory appeal in the Ninth Circuit. [2]

B. Proceedings Below

The Court of Appeals reversed the lower court and found that there is no likelihood that NMA will succeed on its express preemption claim. App. A at pp. 9a, 17a. As recited by the court, regulations pursuant to the FMIA require nonambulatory animals to be classified as "U.S. Suspect" and held for further examination. *Id.* at p. 8a; *see also* 9 C.F.R. § 309.2(b). If the downer animal shows signs of diseases, it must be classified as "U.S. Condemned" and disposed of according to specific procedures. *Id.*; *see also* §§ 309.4-309.18. But, if the animal passes inspection, the federal regulations do not prohibit slaughter and sale for human consumption. *Id.*; *see also* § 309.2.

The Court of Appeals noted that the FMIA contains an express preemption provision (21 U.S.C. § 678[3]), but that this provision "explicitly preserves

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[2] The Humane Society of the United States, Farm Sanctuary Inc., Humane Farming Association and the Animal Legal Defense Fund ("Defendant-Intervenors") successfully intervened as defendants. Defendant-Intervenors opposed the motion as well and appealed to the Ninth Circuit.

[3] "Requirements within the scope of this chapter with respect to *premises, facilities and operations* of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State. . . ." 21 U.S.C. § 678 (emphasis added).

for the states broad authority to regulate slaughterhouses: 'This chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.' 21 U.S.C. § 678." App. A at pp. 8a-9a.

The Ninth Circuit found that there was no express preemption because section 678 of the FMIA preempts state regulation of the "premises, facilities and operations" of slaughterhouses. App. A at p. 9a. Section 599f(a)-(c) deals with none of these, but instead regulates the kind of animal that may be slaughtered. App. A at p. 9a. As the Ninth Circuit noted, two circuits have similarly held that the FMIA does not preempt state laws that regulate the kind of animal that may be slaughtered. App. A at p. 9a; *see Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007) (state ban on horse slaughter not preempted); *Empacadora de Carnes de Fresnillo v. Curry*, 476 F.3d 326 (5th Cir. 2007) (same).

The Ninth Circuit found that "California's prohibition of the slaughter of nonambulatory animals does not duplicate federal procedures; it withdraws from slaughter animals that are unable to walk to their death. This prohibition doesn't require *any* additional or different inspections than does the FMIA, and is thus not a regulation of the 'premises, facilities and operations' of slaughterhouses. There is no express preemption here." App. A at p. 11a.

Additionally, the Ninth Circuit determined that NMA would likely not succeed on its claim that there was implied preemption concerning section 599f's ban on the receipt and slaughter of nonambulatory animals. App. A at p. 11a. The court found to be decisive the provision that "[t]his chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter." *Id.* at p. 12a. The court found that this language in section 678 "shows that Congress did not intend to occupy the field of slaughterhouse regulation, so only conflict preemption is at issue." The court noted that conflict preemption is a demanding standard and courts will not seek out conflicts between state and federal regulations where none exists. *Id.*

The court found that it was not physically impossible to comply with both section 599f and the FMIA. *Id.* FMIA inspection requirements apply to animals that will be slaughtered for human consumption, but nothing in the FMIA requires the slaughter of downer animals for human consumption. *Id.* "Federal regulations require inspection *if* downer animals are to be slaughtered." *Id.* Moreover, the court found that section 599f was not an obstacle to accomplishing the purposes of FMIA. The purpose of FMIA, as noted by the court, is to protect the health and welfare of consumers "'by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and

packaged.'" *Id.* (quoting 21 U.S.C. § 602). The purpose, of the FMIA "is not to preserve the slaughter of any kind of animal for human consumption." *Id.* at pp. 13a-14a. Nor did Congress establish an unlimited choice of what kinds of animals to slaughter for individual slaughterhouses. *Id.* at p. 14a.

The court determined that nothing in section 599f serves as an obstacle to the FMIA. *Id.* Nothing in the record suggests that the requirements of section 599f "were so onerous and confusing that it put slaughterhouse compliance with federal inspection standards at risk." *Id.* The court rejected NMA's argument that section 599f "will prevent the examination of downer animals for disease, hindering federal procedures designed to identify and stem the spread of disease" because nothing in the record substantiated this concern. *Id.* at p. 15a n.7.

The court did find that one provision, section 599f(e) was likely preempted because it prohibits conduct – dragging unconscious downer animals – that federal law does not. *Id.* at p. 15a. Additionally, the FMIA deems more equipment suitable for moving downer animals – such as electric prods – than does section 599f(e). However, at this preliminary injunction stage "NMA failed to offer any evidence on [the issue of irreparable injury]" with respect to section 599f(e) and did not show that the balance of equities and the public interest tipped in its favor as to this provision. App. A at p. 17a.

REASONS FOR DENYING THE PETITION

A. There Is No Conflict Among the Circuits

There is no split of authority on the FMIA preemption issue, and petitioner does not argue to the contrary. The two circuits to have previously considered the issue, now joined by the Ninth Circuit in this matter, have held that state laws prohibiting processing of certain types of meat are not preempted by the FMIA. *See Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007) (state ban on horse slaughter not preempted by similar Meat Inspection Act); *Empacadora de Carnes de Fresnillo v. Curry*, 476 F.3d 326 (5th Cir. 2007) (same). Petitioner argues that the Ninth Circuit decision in this case is a "radical expansion" of the "horsemeat" cases, but this is an overstatement. *See* Pet. at pp. 34-36.

As the Ninth Circuit noted, federal regulations require inspection *if* downer animals are to be slaughtered, but the regulations do not require the slaughter of downer animals. *See Cavel*, 500 F.3d at 553-554 (FMIA applied to any horsemeat slaughtered for human consumption, but it did not require states to allow horses to be slaughtered for human consumption); *Empacadora De Carnes De Fresnillo*, 476 F.3d at 333 ("[t]his preemption clause expressly limits states in their ability to govern meat inspection and labeling requirements. It in no way limits states in their ability to regulate what types of meat may be sold for human consumption in the first place"). In *Cavel Int'l*, the Seventh Circuit noted that horsemeat

production must comply with the FMIA, but if horsemeat is not produced, "there is nothing, so far as horse meat is concerned, for the [FMIA] to work upon." 500 F.3d at 554.

Similarly, here, the Ninth Circuit recognized that California has limited the slaughter and production of certain types of animals – nonambulatory animals – sold for human consumption, by prohibiting purchase, sale or processing of such animals. The Ninth Circuit decision is in accord with the decisions of the only other two circuits to have dealt with a similar issue.

Petitioner claims that the court of appeals decision in this case is a "radical expansion" of *Cavel* and *Empacadora De Carnes De Fresnillo* because the Ninth Circuit tries to "broaden the 'type of meat' distinction so as to also extend to a State the ability to regulate the 'kind of animal' that may be slaughtered." Pet. at p. 35. However, the Ninth Circuit dealt with this argument in its opinion, finding that a state is "not limited to excluding animals from slaughter on a species-wide basis." App. A at p. 10a. In fact, the Ninth Circuit posited that a state could for example ban the slaughter of domesticated animals while allowing the slaughter of wild dogs and horses – it therefore found no logical reason why a state could not regulate what kinds of animals could be slaughtered based on "practical, moral and public health judgments that go far beyond those made in the FMIA." *Id.*

Moreover, the argument that federal law sets the sole standard for activities occurring on the grounds of a federally-regulated slaughterhouse, (Pet. at p. 35) is not precise. For example, the fact that a horse strayed into the grounds of a federally-regulated slaughterhouse in Illinois or Texas, would not mean that the FMIA would determine whether that animal could be slaughtered for human consumption. Under *Cavel* and *Empacadora*, state-law limitations on such slaughter would apply. Similarly, in California, a downer animal, on the grounds of a federally-regulated slaughterhouse, is not allowed to be processed for human consumption.[4] Since the downer livestock cannot be processed for human consumption, the food processing portions of the FMIA simply do not come into play. Thus, the Ninth Circuit's decision is a logical extension of the "horsemeat" cases, not the "radical expansion" claimed by petitioner.

For all these reasons, the petition presents no split in authority of any type because the three circuits to deal with the federal meat inspection preemption issue, the Fifth, Seventh, and now the Ninth, have all reached the same conclusion.

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[4] *Rath* and *Armour*, cited by plaintiff, are both limited to cases dealing with "marking, labeling, . . . or ingredient requirements" and do not support plaintiff's argument that merely stepping into a federally-regulated slaughterhouse means that an animal must be slaughtered pursuant to the FMIA. Pet. at p. 35, (citing *Rath Packing*, 430 U.S. at 525, 532 and *Armour & Co. v. Ball*, 468 F.2d 76, 84 (6th Cir. 1972)).

B. There is No Conflict with Any Decision of This Court

The purported conflict with *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, alleged by petitioner simply does not exist. Pet. at pp. 21-27. The Ninth Circuit decision in this case noted the presumption against preemption in language taken directly from *Rath Packing*: "Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, [citations omitted], 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Rath Packing Co.*, 430 U.S. at 525; *see* App. A at p. 8a.

Although petitioner acknowledges the presumption against preemption, it argues nonetheless that this Court held that the "FMIA was a specific example of 'Congress having "unmistakably . . . ordained" that its enactments alone are to regulate a part of commerce, [in which case] state laws regulating that aspect of commerce must fall.'" Pet. at p. 19. Petitioner's assertion does not accurately reflect the holding or reasoning of *Rath Packing*.

Petitioner's reliance on *Rath Packing* and *Armour* (Pet. at p. 19), is misplaced, as those cases dealt with preemption of state statutes regarding the "marking, labeling, packaging, or ingredient requirements" portion of section 678 – state regulation in these areas is expressly preempted, but are not at issue

here. Nowhere in *Rath Packing* did this Court state that the FMIA as a whole is an instance where Congress unmistakably ordained that only the FMIA should regulate any part of commerce. The FMIA itself is directly to the contrary, clearly anticipating areas where the federal statute will not govern: "This chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter." 21 U.S.C. § 678.

Rather, *Rath Packing* held that the particular state law at issue was preempted because the FMIA prohibits any "marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made" under the FMIA. *Rath Packing*, 430 U.S. at 531. The state law in *Rath Packing Co.* allowed the removal of food products, bacon, and flour in that case, when the average net weight was less than the net weight stated on the package. *Id.* at 522. However, it was shown that the state measured weight by a different method than specified in the FMIA, and the producers of bacon and flour had correctly measured the weight of their product. *Id.* at 526-528, 531-532. Thus, this Court found a direct conflict between what the state allowed regarding labeling and what the FMIA allowed – and determined that FMIA preempted the state law. *Id.* at 531. Contrary, to petitioner's argument here (Pet. at pp. 19, 21-22), there was no over-arching holding in *Rath Packing* that the FMIA always preempts state laws.

Moreover, petitioner does not persuade in its argument that *Rath Packing* requires that the FMIA preemption provision be given a "broad meaning" and that *Rath Packing* is at odds with the "narrow interpretation of the Ninth Circuit." Pet. at pp. 22-27. Giving a "broad meaning" to the FMIA preemption provision was an argument made by respondents in *Rath Packing Co.*, and was not a "holding" by this Court. *Rath Packing*, 430 U.S. at 540. The facts of the *Rath Packing* case dealt specifically with labeling, and this Court compared the labeling requirements of the state law with the labeling requirements required under federal law and found that the state law had "different" requirements. *Id.* at 526-528, 531-532. The facts of *Rath Packing* are inapposite to this case because, at issue here, is a state law limiting animals that may be processed for human food, on the one hand, and the FMIA provision dealing with the "premises, facilities, and operations of any establishment," on the other. The Ninth Circuit, correctly decided that section 599f does not require any "different" procedures on the "premises, facilities, and operations of any establishment."

C. There is No Confusion About When or How to Apply the Presumption Against Preemption

There is a strong presumption against federal preemption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy

Clause starts with the basic assumption that Congress did not intend to displace state law."). This is particularly true where the state law concerns traditional areas that come within the police power, such as health and safety laws. *Wyeth v. Levine*, 129 S.Ct. 1187, 1194-1195 (2009).

A court must presume that a state statute is not preempted, and the *moving party* has the burden of overcoming that presumption. *Pharmaceutical Research and Mfrs. of America v. Walsh*, 538 U.S. 644, 661-662 (2003) (emphasis added). Moreover, the presumption against preemption applies regardless of whether the plaintiff asserts that a law is expressly or impliedly preempted. *Wyeth*, 129 S.Ct. at 1195 n.3 ("We rely on the presumption because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state law causes of action.'") (citations omitted).

Petitioner argues that the question of when a presumption against preemption should apply has been a topic of recent debate within this Court (Pet. at pp. 29-31), but even if the assertion were true, the presumption was not dispositive of the Ninth Circuit's decision.

The cases petitioner cites to support its argument are inapposite. For example, in *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543 (2008), the majority of this Court expressly applied the presumption against preemption and stated that "we 'wor[k] on the

assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Id.* (citations omitted). And in *Cuomo v. Clearing House Ass'n*, 129 S.Ct. 2710 (2009), this Court did not invoke the presumption against preemption, because preemption so clearly applied. *Id.* at 2721. There was no question in *Cuomo* that preemption existed, and there was accordingly no need to invoke the presumption against preemption. The cases cited by petitioner do not demonstrate any meaningful confusion about the presumption against preemption.

Moreover, contrary to petitioner's portrayal, the Ninth Circuit's decision does not rest on the presumption against preemption alone. App. A at p. 8a. The court noted that

> [c]onsistent with the presumption against preemption, we must give this provision a narrow interpretation . . . *More so because section 678 explicitly preserves for the states broad authority to regulate slaughterhouses: "This chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter."*

Id. at pp. 8a-9a (emphasis added). Thus, contrary to petitioner's argument (Pet. at pp. 29-31), there is more to the Ninth Circuit's reasoning than a mere reliance upon the presumption against preemption – the court viewed the presumption along with the

"saving" clause in the statute to come to the proper conclusion that there was no express preemption. *Id.* at p. 9a.

D. This is Not a Case of National Importance

Unable to identify any circuit split or any real conflict with a decision of this Court, petitioner asserts that California law creates an immediate risk to human health and safety. Pet. at pp. 31-34; *see also* Motion for Leave to File Brief as *Amici Curiae* and Brief of the American Association of Swine Veterinarians and the National Pork Producers Council as *Amici Curiae* in Support of Petition for Writ of Certiorari ("Amici Br.") at pp. 2-12. This is simply not the case, and indeed, the argument turns the record on its head.

Petitioner argues that "emergency response actions such as segregation or quarantine will be significantly delayed" for diseases identified post-mortem. Pet. at p. 32. But, the Ninth Circuit properly disposed of this argument, stating, "[n]othing in the record substantiates this concern, and section 599f doesn't prohibit post-mortem inspection of downer animals." App. A at p. 15a n.7.

As to ante-mortem inspection, the regulations cited by petitioner, 9 C.F.R. §§ 309.5, 309.15, do not require an ante-mortem inspection. Rather § 309.5 only requires that all swine with hog cholera shall be identified as "U.S. Condemned" and disposed of in a specified manner. Indeed, section 309.15 specifically *prohibits* ante-mortem inspection of livestock under

quarantine by State or Federal livestock sanitary officials on account of a vesicular disease.[5] If the quarantine is revoked (or none was in place), then any animal affected by vesicular problems "shall be identified as U.S. Condemned." *Id.* Livestock identified as U.S. Condemned "shall be killed by the official establishment, if not already dead" unless otherwise provided. 9 C.F.R. § 309.13. Thus, section 599f interferes with none of these important health protections in the federal regulations.

Similarly, petitioner's amici argue that ante-mortem inspection is essential to detect certain diseases, and "some of this information can only be determined by viewing the animal in motion during the ante-mortem inspection." Amici Br. at p. 6. Amici contend that the ante-mortem inspection consists of two steps: (1) observing animals at rest, and (2) observing animals in motion. Amici Br. at pp. 7-10. This concern, however, ignores the definition of "non-ambulatory" which means an animal "unable to stand and walk without assistance." *See* Cal. Penal Code § 599f(i). It would be impossible to observe the nonambulatory swine in motion under amici's proposed scenario because, by definition, the animal

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[5] Section 309.15 does require immediate notification to ocal, state, and federal livestock sanitary officials having urisdiction when any vesicular disease is found. 9 C.F.R. § 309.15. This does not conflict with any provision in section 599f, and thus there is no conflict with the health protections provided in the federal regulation.

would not be moving. Moreover, notwithstanding petitioner's and amici's arguments to the contrary, on this preliminary injunction record, there is no evidence that the provisions of section 599f conflict with any federal regulation or directive regarding ante-mortem inspection. App. A at pp. 13a n.5, 15a n.7.

The claim that there is "immediate risk to animal and human health and safety" by section 599f reaches too far and is not supported by the record in this case. Pet. at pp. 31-34. A similar rule and regulation to section 599f was adopted by the federal government with respect to the immediate humane euthanization of nonambulatory cattle. The Federal Safety and Inspection Service (FSIS) noted that this rule was changed to reduce uncertainty in determining the proper disposition of nonambulatory disabled cattle and would eliminate the time FSIS public health veterinarians spend determining whether or not an animal can be tagged as "U.S. Suspect," proceed to slaughter, and then be re-inspected after slaughter, thereby increasing the time inspection program personnel can focus on other inspection activities. 74 Fed. Reg. 11463. Thus, the FSIS determined that it would be *better* to immediately euthanize downer cattle so inspectors could spend more time on other inspections. *Id.* The record in this case, as developed, does not provide evidence on this subject, but on remand the record could be developed to show that less ante-mortem inspection of nonambulatory swine could be good for the food supply – contrary to petitioner's current argument.

E. In any Event, This Case is Not a Good Vehicle for Consideration of the Issues Presented

This case is not a good vehicle for consideration of the issues asserted because the case comes to this Court on a preliminary injunction order, and several of the arguments made by plaintiff revolve around issues not established in the record. At the present time, it is premature, at best, to consider this case. The Ninth Circuit reversed the lower court and found that there is no likelihood of express or implied preemption. App. at pp. 9a, 11a-15a, 17a. Nonetheless, in one narrow respect, the Ninth Circuit found that section 599f(e) was likely preempted because it prohibited conduct – dragging unconscious downer animals – that federal law does not. *Id.* at p. 15a. Additionally, the FMIA deems more equipment suitable for moving downer animals – such as electric prods – than does section 599f(e). However, "NMA failed to offer any evidence on [the issue of irreparable injury]" with respect to section 599f(e) and did not show that the balance of equities and the public interest tipped in its favor as to this provision. App. A at p. 17a. On remand to the district court, whatever may be the district court's eventual decision on these issues upon consideration of further evidence, there is likely to be a further appeal.

F. The Court of Appeals' decision was correct

Many of petitioner's reasons for granting the petition revolve around its disagreement with the

merits of the decision issued by the Ninth Circuit. Pet. at pp. 24-27, 31-36. In addition to not presenting a compelling basis for further review, the Ninth Circuit's decision is well-reasoned and properly applies established law. First, the Ninth Circuit correctly held that there is no express preemption of state regulation of slaughterhouses in the manner provided in Section 599f.[6] To the contrary, Congress has expressly invited state regulation in this area that is consistent with federal law. Second, the Ninth Circuit correctly concluded that "NMA's implied preemption claim concerning section 599f's ban on the receipt and slaughter of nonambulatory animals fares no better" than its express preemption claim. App. A at p. 11a. The court correctly held that it was physically possible to comply with both section 599f and the FMIA. *Id.* at pp. 12a-14a. Additionally, the court correctly determined that nothing in section 599f serves as an obstacle to the FMIA's objective of safeguarding the quality of meat available for human consumption. *Id.*

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[6] As respondents have acknowledged, the Ninth Circuit did find that one narrow portion of the law, section 599f(e) was likely preempted, but the court deferred consideration of the issue pending a showing by plaintiff of any prejudice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: December 15, 2010

Respectfully submitted,

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REPLY BRIEF

Supreme Court, U.S.
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No. 10-224

In The
Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

EDMUND G. BROWN JR., in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA; THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER

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RULE 29.6 STATEMENT

As noted in the Petition, the National Meat Association is an association, not a nongovernmental corporation, and is not required to file a Corporate Disclosure Statement pursuant to Sup. Ct. R. 29.6.

INDEX TO ABBREVIATIONS

The brief in opposition for Respondents Governor Arnold Schwarzenegger, Attorney General Edmund G. Brown Jr., and State of California is referred to as the State's brief ("State").

The brief in opposition for the Non-State Respondents The Humane Society of the United States, Farm Sanctuary, Inc., Humane Farming Association, and Animal Legal Defense Fund is referred to by the name of the first non-state Respondent, The Humane Society of the United States ("HSUS").

The amicus brief of the American Association of Swine Veterinarians and the National Pork Producers Council in Support of the Petition for a Writ of Certiorari is referred to as the amicus brief ("Amicus").

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REPLY TO BRIEFS IN OPPOSITION

Ante-mortem inspection lies at the very heart of the FMIA. Congress' clear intent to preempt state laws interfering with such inspections is evident in the very title of the preemption provision, which provides for the "prohibition of additional or different requirements for establishments with inspection services." 21 U.S.C. § 678. Yet California has directly thwarted this federal scheme, not only prohibiting but *criminalizing* federal ante-mortem inspection of nonambulatory pigs.

Respondents attempt to trivialize the admitted interference by the State as merely "academic" because, they contend, the State law affects only an "extremely small and wholly unquantified," HSUS 10, 32, number of nonambulatory pigs, which are not destined for the food supply in any event. But that argument, which permeates Respondents' opposition, is fundamentally wrong. As underscored by the amicus filing from the American Association of Swine Veterinarians, the State's prohibition on ante-mortem inspection of nonambulatory pigs poses a direct threat to the health of the entire lot of *ambulatory* swine destined *for human consumption*, since the detection of vesicular disease or hog cholera in even one nonambulatory animal may trigger a quarantine of the entire lot. *See* Amicus 4, 6, 10-11. Indeed, a single infection at one premises can threaten up to 100,000 hogs. *Id.* 6. And the uncontested evidence in the record reflects that over 200 pigs a day become

nonambulatory while on the premises of just one California facility. C.A.App. 886 (Terrill Decl. ¶ 9).

The Ninth Circuit nonetheless found that California's criminalization of these federal inspection requirements does *not* impose "requirements . . . with respect to . . . operations . . . different than" the FMIA's. This can only be explained by that court's explicit reliance on the "presumption against preemption" and disregard for this Court's interpretation of the same express preemption provision in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). Accordingly, the pure question of law presented by the Petition – a question not dependent on any factual record and clearly pressed and passed upon below – calls for this Court's review.

I. RESPONDENTS' BRIEFS HIGHLIGHT THE NEED FOR THIS COURT TO GRANT CERTIORARI

Though carefully buried on page 32 of its opposition, HSUS is forced to concede that there are legitimate preemption concerns for those swine "who can walk into the slaughterhouse but become nonambulatory in the interval between receipt and slaughter." *See* HSUS 32. There is simply no doubt that pigs that *become* nonambulatory on slaughterhouse premises are, under the FMIA and its regulations, subject to segregation and careful ante-mortem inspection, while under the California law such segregation and ante-mortem inspection are criminal

acts. Section 599f is thus far more than merely "a law preventing nonambulatory animals from 'entering the federal premises at all.'" HSUS 17.

Respondents belittle this concern, suggesting that it is "essentially academic" because there is "zero evidence in the record about the number of animals in this group," which, according to HSUS, don't matter because they are never going to be put in the food supply anyway. HSUS 10-11. That argument betrays at best a studied ignorance of both the record and the regulations.

First, the record evidence is that at one California federally-inspected slaughter facility alone, "[a]pproximately 225 pigs per day are temporarily unable to stand or walk while awaiting slaughter." C.A.App. 886 (Terrill Decl. ¶ 9). These are animals that have been presented for slaughter, but because of stress, sickness or stubborness, cannot or will not move.

Second, the federal ante-mortem inspection regime, as the regulations make clear on their face, is for the protection of, among other things, the entire lot of *ambulatory* animals on the premises who ultimately will become human food. Federal regulations for ante-mortem inspection make clear that the detection of a serious communicable disease in *one* nonambulatory animal may trigger the quarantine or segregation of the *entire herd*, which would otherwise be slaughtered for *human consumption*. *See e.g.*, 9 C.F.R. §§ 309.5, 309.15; *see* State 19-20. Early

detection *pre-slaughter* is critical for this very reason, yet prohibited by Section 599f. The Swine Veterinarians' brief highlights how California's immediate euthanization requirement criminalizes the performance of federal ante-mortem inspection procedures specifically designed for nonambulatory livestock. *See* Amicus 10. Thus, although Respondents erroneously claim that a state law is "'within the scope of' the FMIA only if it imposes additional or different requirements relating to the inspection or slaughter of animals who will be used to produce meat and meat products," HSUS 19, this is precisely what California's criminal law does.

Further, Respondents' entire premise – that the FMIA only applies to animals "presented for slaughter" and intended to enter the food supply – is wrong. *See* HSUS 5. The FMIA applies to *all* animals on federally-inspected slaughterhouse premises.[1] As the Petition also made clear, the FMIA *expressly* "regulates . . . how a slaughterhouse may 'receive' a nonambulatory animal," *see* HSUS 19, with FSIS Directives providing that vehicles arriving at slaughterhouse premises are "considered to be part of that establishment's premises," and that federal inspectors may perform ante-mortem inspection of nonambulatory animals on the vehicle itself, or else ensure that such animals are removed from the

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[1] *See, e.g.*, 9 C.F.R. § 302.3: All livestock . . . entering any official establishment . . . shall be inspected [and] handled . . . as required by the regulations in this subchapter.

vehicle and moved "to the designated antemortem areas or pens in a humane manner." Pet. 11; FSIS Directive 6900.1, Rev. 1. These acts, too, are criminal under California law.

Respondents purport to worry that FMIA preemption of the California law would blur the line between a state's legitimate prohibition on the slaughter of horses (or non-free range chickens) and its interference in the FMIA inspection process. *See* HSUS 20; Pet. App. 10a. But that is a false concern. The condition of becoming "nonambulatory," unlike the condition of being a horse or being a grass-fed cow, occurs *on* the federal premises and is detected and addressed as part of the federal inspection process. Indeed, it is the FMIA itself that "offers [the] . . . coherent way to draw th[is] line" by expressly preempting only those state laws impinging upon the "premises, facilities and operations" of any federally-inspected slaughterhouse. Horses, or non-grass-fed or non-free-range livestock, can be kept off the slaughterhouse premises, as well as off the trucks transporting those animals. By contrast, when pigs walk themselves onto a truck, it is not known until that truck arrives at the slaughterhouse and its doors are opened whether any animals are now unable to leave the truck on their own. That the truck must be on slaughterhouse grounds before it is known which animals became unable to stand or walk while in transit brings the preemptive force of the FMIA directly to bear on Section 599f(a). *See* C.A.App. 885 (Terrill Decl. ¶ 5).

Respondents' defense of Section 599f is further undermined by their failure to acknowledge that the FMIA *is*, in fact, a "general federal law . . . preventing cruelty to farm animals," HSUS 4, on federally-inspected premises. The Humane Methods of Slaughter Act, expressly incorporated into the FMIA, *see* 21 U.S.C. § 603(b), ensures that all livestock on slaughterhouse premises – not just those "presented for slaughter" – be handled "in accordance with humane methods." *See* Pet. 9. Respondents fail even to acknowledge the federal regulations governing the humane handling of nonambulatory livestock, even though discussed in three separate places in the Petition. *See* Pet. 3, 10-11, 13, and App. 70a-71a (concerning 9 C.F.R. §§ 313.1(c), 313.2(d)(1)). These regulations mandate that "animals unable to move shall be separated from normal ambulatory animals and placed in [a] covered pen," and held "while awaiting disposition by the inspector." *Id.* Compliance with these regulations would, under the California law, constitute criminal acts. *See* HSUS 1; Cal. Penal Code § 599f(c).

These federal requirements are plainly "different than" those of the State, as the FSIS made clear when it expressly considered and rejected changing federal regulations. 74 Fed. Reg. 11463; Pet. 5, 14, 24. The State simply fails to address the pertinence of the FSIS's decision, State 21, while HSUS cites inapposite decisions from this Court so as to obfuscate the relevance and significance of the FSIS's considered rejection of these requirements, HSUS 23-24.

Notably, HSUS mischaracterizes the FSIS's statements as "a federal decision to *forego regulation* in a given area," *see* HSUS 23 (emphasis added), when nothing could be farther from the truth. Unlike *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, the case HSUS quotes for this proposition, where the federal agency "determined . . . that it *did not have jurisdiction* under the Federal Power Act," 461 U.S. 375, 383 (1983) (emphasis added), the FSIS preserved the federal regulations already in force requiring nonambulatory swine to be inspected and humanely handled rather than mandating immediate euthanization. And here, Congress itself "'convey[ed] an "authoritative" message' that there is a federal policy against [the State's] regulations" concerning the inspection, handling, and processing of nonambulatory swine on federally-inspected slaughterhouse grounds, *see* HSUS 23 (quoting *Sprietsma v. Mercury Marine*, 537 U.S. 51, 67 (2002)), by expressly preempting state laws "in addition to, or different than" the FMIA's requirements.

That the Ninth Circuit nonetheless refused to enforce FMIA preemption can only be explained by its holding that, "[c]onsistent with the presumption against preemption, we *must* give this provision a narrow interpretation." Pet. App. 8a (emphasis added).[2] Respondents defend this ruling by maintaining

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[2] The Ninth Circuit's own words thus show the presumption against preemption was "passed upon," and arguments against its application were of course "pressed" as well. NMA responded

(Continued on following page)

that *Rath Packing* does not control the presumption's invocation here, but such a contention only further demonstrates the need for this Court's review.

As its own title highlights, the FMIA's preemption provision intentionally uses identical language to effectuate its "prohibition of additional or different requirements for establishments with inspection services *and* as to marking, labeling, packaging, and ingredients":

> *Requirements* . . . with respect to premises, facilities and operations . . . which are *in addition to, or different than those made under this chapter may not be imposed by any State*. . . .
>
> Marking, labeling, packaging, or ingredient *requirements in addition to, or different than, those made under this chapter may not be imposed by any State*. . . .

21 U.S.C. § 678 (emphasis added) (*see* Pet.App. 63a). Yet Respondents assert that because this Court's *Rath Packing* decision focused on the words in the second prohibition rather than the first, its holding as

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to the State's reference to the presumption by pointing to Congress' unequivocal intent in the plain language of Section 678 and to past decisions finding that "Congress has 'unmistakably . . . ordained' that the Federal Act fixes the sole standards." Appellee Br. 26-27. When the Ninth Circuit ignored the authority cited by NMA and made the presumption central to its holding, NMA pointed out this error in its petition for rehearing en banc and its petition to stay the mandate.

to the preemptive breadth of those words "can have no impact on this case," HSUS 25, and the Ninth Circuit could simply ignore *Rath Packing*, as it did. This Court, however, recognizes that when Congress reuses the same phrase in the same statute (let alone in the same paragraph), it intends the same meaning to apply. *See, e.g., National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 501 (1998) ("similar language contained within the same section of a statute must be accorded a consistent meaning").[3]

Nor does the "savings" clause found at the end of § 678 justify the Ninth Circuit's "conclusion that there was no express preemption." State 18-19. This Court acknowledged that clause in nonetheless finding preemption in *Rath Packing*, 430 U.S. at 530-31 & n.17, and the Ninth Circuit's opinion that it shows a narrow intent for express preemption is in

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[3] Respondents also try to explain the Ninth Circuit's holding as merely allowing a state to make *mandatory* what they say is otherwise *permitted* under federal law – simple removal of an animal from the slaughter process without inspection. HSUS 22. As shown above, that characterization is not accurate for a pig that has become nonambulatory once on the federally-inspected premises. But even if it were accurate, it would be preempted as "in addition to" the federal scheme. *See McMullen v. Medtronic, Inc.*, 421 F.3d 482, 489 (7th Cir. 2005), *cert. denied*, 547 U.S. 1003 (2006) ("Where a federal requirement permits a course of conduct and the state makes it obligatory, the state's requirement is in addition to the federal requirement and thus is preempted.").

direct conflict with what the Sixth Circuit has said is the effect of that clause: "By permitting state action 'with respect to any other matters regulated under this chapter,' Congress is unmistakably ordaining that a state may *not* take action with reference to . . . 'requirements in addition to or different than, those made under this chapter'" for those areas "completely preempt[ed]" by the statute. *Armour & Co. v. Ball*, 468 F.2d 76, 84-85 (6th Cir. 1972) (emphasis added). Rather, the proper effect of this savings clause is to leave to state regulation those matters outside the scope of the FMIA, "such as state building codes, workplace safety requirements, and general criminal laws." HSUS 18. The Ninth Circuit's determination that disease inspection and humane handling requirements lying at the heart of the FMIA were, because of the "presumption against preemption," instead encompassed within this savings clause flies in the face of Congress' express intent, as interpreted by this Court, and that makes this a compelling case for the Court's review.

II. THIS CASE PRESENTS A DISCRETE, CONCRETE, AND IMPORTANT ISSUE OF LAW THAT IS PARTICULARLY SUITED FOR REVIEW BY THIS COURT AT THIS TIME.

Rhetoric aside, Respondents themselves acknowledge "the only legal argument [the Petition] raises is a contention that certain provisions of § 599f are expressly preempted by the FMIA[.]" HSUS 13. That purely legal issue was squarely presented below and rejected by the Ninth Circuit. Pet. App. 7a-11a. The Ninth Circuit's ruling that "[t]here is no express preemption here," *id.* 11a, was a clear, definitive statement of law that is not open to challenge on remand, and the Ninth Circuit refused to reconsider its ruling on rehearing or rehearing *en banc*, *id.* 58a-59a. Should this Court find that express preemption exists and reverse the Ninth Circuit's ruling to the contrary, that would dispose of the matter.

The express preemption issue turns on the language of the relevant statutes, regulations, and agency directives, and the policies expressed therein. *See, e.g., FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990) (express preemption "is compelled [when] Congress' command is explicitly stated in the statute's language[.]") (quoting *Rath Packing*, 430 U.S. at

525). The express preemption at issue here does not depend upon factual evidence in the record.[4]

As the Court's rules request, *see* Sup. Ct. R. 10, the Petition calls the Court's attention to the important, real-world consequences of the Ninth Circuit's failure to enforce the FMIA's express preemption provision. Those consequences are evident in the FSIS regulations and directives themselves, *see* Pet. 31-32, and their importance is further made manifest both by the amicus brief offered by the Swine Veterinarians and by the facts regarding "the immediate risk to animal and human health and safety created by the California law," which "counsels immediate review" by this Court.[5] Pet. 31. Such facts aid the Court's decision in determining whether to grant certiorari, but the merits will be decided by the intent of Congress expressed in the statute and carried out in the implementing regulations.

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[4] Respondents recognize that factual evidence in the record was relevant below to the issue of "conflict preemption," *see* HSUS 12 – an issue that Petitioner has not asked this Court to review. Petitioner has not "waived" or "abandoned" its arguments thereon; it has simply focused its petition to this Court solely on the issue of express preemption.

[5] NMA has not "changed its tune." HSUS 33. NMA said in the courts below and again in n.6 of its Petition that *federally inspected* pigs do not pose a threat to health (and that is why granting the injunction NMA sought did not pose a threat to health); the California law, which would eliminate federal antemortem inspection for nonambulatory pigs, is a direct threat to human and animal health.

Moreover, as noted above, Respondents' remarkable assertions regarding the facts are simply wrong. Whereas HSUS asserts there is "zero evidence" this issue ever comes up, the record shows that, on average, it comes up *225 times a day*, at just a *single* slaughterhouse. *See* p. 3, *supra*. And as the federal regulations and directives show, it only takes one of them – if an ante-mortem inspection reveals a communicable disease – to require the quarantine of a whole herd otherwise destined for human consumption.

This is thus a very important case. Indeed, although Respondents claim the Ninth Circuit did not think this was "a borderline case," HSUS 10, the Ninth Circuit in fact, over Respondents' opposition, stayed its mandate in order to provide this Court a full opportunity to review the express preemption issue now, before the Ninth Circuit's vacation of the injunction ordered by the district court itself upends the long-standing status quo by permitting state law to trump the FMIA. *See* Pet. App. 56a.

In short, this case presents a particularly appropriate vehicle to review the Ninth Circuit's refusal to enforce the express preemption provisions of the FMIA against a state law crucially different than the federal law which this Court has said Congress "unmistakably ordained" should control. That narrow but surpassingly important legal issue was fully briefed, squarely considered, and definitively rejected

by the Ninth Circuit. Its ruling should be reviewed and reversed by this Court now.

CONCLUSION

The petition for a writ of certiorari should be granted.

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AMICUS CURIAE BRIEF

No. 10-224

In the Supreme Court of the United States

NATIONAL MEAT ASSOCIATION, PETITIONER

v.

KAMALA D. HARRIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.*, expressly preempts any state law that imposes a "[r]equirement[] within the scope of [the Act] with respect to premises, facilities and operations" of any slaughterhouse inspected under the Act that is "in addition to, or different than" requirements under the Act. 21 U.S.C. 678. The question presented is whether that provision preempts California Penal Code § 599f, which requires, *inter alia*, the immediate euthanasia of non-ambulatory swine at slaughterhouses subject to the Act.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Since 1907, federal law has regulated a broad range of activities at slaughterhouses to ensure the safety of meat and meat food products. See Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1260. That law has been amended several times and is now designated as the Federal Meat Inspection Act (FMIA or Act), 21 U.S.C. 601 *et seq.* The FMIA regulates matters such as the humane handling and slaughter of livestock, the ante-mortem selection of animals suitable for slaughter for human food, the post-mortem inspection of carcasses, the marking and labeling of meat and meat food products, and

sanitary conditions for slaughtering and processing. See 21 U.S.C. 603-604, 607-608. In many States, essentially all slaughterhouses are subject to the FMIA. See 21 U.S.C. 610; but see 21 U.S.C. 661(a) (permitting cooperative federal-state implementation of state inspection regimes for slaughterhouses producing meat only for intrastate consumption); 21 U.S.C. 623(a) (exempting certain "[p]ersonal slaughtering and custom slaughtering").

Two components of the FMIA's scheme are particularly relevant here. First are its ante-mortem and post-mortem inspections. The Act directs the Secretary of Agriculture (USDA) to inspect animals "before they shall be allowed to enter into any slaughtering * * * establishment" and requires that those animals that "show symptoms of disease" be "set apart and slaughtered separately" from other animals. 21 U.S.C. 603(a). The FMIA further directs USDA to make "a post mortem examination and inspection of the [slaughtered animal] carcasses and parts thereof * * * to be prepared * * * as articles of commerce which are capable of use as human food." 21 U.S.C. 604. USDA is authorized to make "such rules and regulations as are necessary for the efficient execution of the provisions of [the FMIA]." 21 U.S.C. 621.

Second, in the Humane Methods of Slaughter Act of 1958 (HMSA), Pub. L. No. 85-765, 72 Stat. 862, Congress established a federal policy regarding the humane handling and slaughter of livestock. HMSA declares that "[n]o method of * * * handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane," and it authorizes USDA to "designate methods * * * of handling in connection with slaughter which, with respect to

each species of livestock, conform to th[at] policy." HMSA §§ 2, 4(b), 72 Stat. 862-863 (7 U.S.C. 1902, 1904(b)).

As originally enacted, HMSA applied only to "[federal] procurement and price support programs and operations." HMSA § 3, 72 Stat. 862. In 1978, Congress extended HMSA to all federally inspected slaughterhouses by "amend[ing] the Federal Meat Inspection Act to require that meat inspected and approved under such Act be produced only from livestock slaughtered in accordance with humane methods." Humane Methods of Slaughter Act of 1978, Pub. L. No. 95-445, 92 Stat. 1069 (HMSA 1978). In particular, Congress amended the FMIA to require USDA to make "an examination and inspection of the method by which [livestock] are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under [the FMIA]," and to authorize USDA to refuse inspection at a slaughtering establishment if livestock "have been slaughtered or handled in connection with slaughter at such establishment by any method not in accordance with the [HMSA]." HMSA 1978 § 2, 92 Stat. 1069 (adding 21 U.S.C. 603(b)). Congress also directly required slaughterhouses to comply with the HMSA. HMSA 1978 § 3, 92 Stat. 1069 (amending 21 U.S.C. 610).

b. The Food Safety and Inspection Service (FSIS), an agency in USDA, administers all aspects of the FMIA, including inspections and humane-handling requirements. See 9 C.F.R. 300.1 *et seq.* The regulations pertaining to humane handling establish, *inter alia*, standards for the good repair of slaughterhouse facilities to avoid injury to livestock; practices for humanely driving animals within the establishment; and rules for the humane handling of diseased or disabled animals. See gen-

erally 9 C.F.R. 313.1-.2. The regulations pertaining to ante-mortem and post-mortem inspection establish a system of identifying certain animals as condemned and unsuitable for human food; identifying other animals as potentially unsuitable for human food (in whole or in part), subject to further examination; and passing other animals for slaughter. See generally 9 C.F.R. Pts. 309-310.

In particular, animals showing on ante-mortem inspection symptoms of certain diseases or conditions are classified as "U.S. Condemned." 9 C.F.R. 309.3-.9, .15-.16; see 9 C.F.R. 301.2. Such animals may not be used as human food, and they must be killed apart from the slaughtering facilities where human food is produced. 9 C.F.R. 309.13. Their carcasses must be handled and disposed of so as not to adulterate products for human consumption. See 9 C.F.R. Pt. 314.

Animals found or suspected on ante-mortem inspection to be affected with certain other diseases or conditions are classified as "U.S. Suspect." 9 C.F.R. 309.2(c)-(h) and (j)-(*l*); see 9 C.F.R. 301.2. In addition, "seriously crippled animals and non-ambulatory disabled livestock shall be identified as U.S. Suspects." 9 C.F.R. 309.2(b).[1] U.S. Suspects "shall be set apart and shall be slaughtered separately from other livestock." 9 C.F.R. 309.2(n); see FSIS Directive 6900.1 (rev. 1, Nov. 2, 1998) (Part Two I.A.1.k). As a matter of humane handling, U.S. Suspects (including nonambulatory disabled animals) must be kept in a covered pen with access to water

[1] Nonambulatory disabled full-grown cattle are the exception to this rule. Such animals are condemned because the inability to walk is a symptom of bovine spongiform encephalopathy ("mad cow disease"). See 9 C.F.R. 309.3(e); 69 Fed. Reg. 1862 (2004); 72 Fed. Reg. 38,700 (2007); 74 Fed. Reg. 11,463 (2009)

(and if held more than 24 hours, feed), pending observation and disposition by the FSIS inspector. 9 C.F.R. 313.1(c); see 9 C.F.R. 313.2(d)-(e) (governing treatment of "animals unable to move").

For swine, the observation period and ante-mortem inspection allow inspectors to determine if the affected animals have a communicable disease that signals a threat to the larger swine population. For example, 9 C.F.R. 309.15 requires federal inspectors to notify local, state, and federal livestock sanitary officials "when any livestock is found to be affected with a vesicular disease," which includes the highly communicable and potentially economically devastating foot-and-mouth disease.

The carcasses of animals classified as "U.S. Suspect" are ultimately disposed of as provided in 9 C.F.R. Part 311. Those regulations guide FSIS inspectors' discretion in determining upon post-mortem examination which parts, if any, of a suspect carcass may be salvaged as unaffected by the disease or condition that warranted the animal's identification as "U.S. Suspect"—and thus may be processed into meat and meat food products for human consumption.

After slaughter and post-mortem inspection, slaughterhouses and other establishments butcher and process carcasses into meat products. FSIS inspectors examine those products and the establishments in which they are prepared to determine if the products are "adulterated," a term embracing a wide range of conditions that make meat unsuitable for use as human food. See 21 U.S.C. 606(a) (Supp. III 2009) (requiring inspections); 21 U.S.C. 601(m) (defining "adulterated"); 9 C.F.R. Pt. 318 (implementing regulations).

c. The Wholesome Meat Act, Pub. L. No. 90-201, 81 Stat. 584 (1967), amended the FMIA and added the express preemption provision at issue in this case:

> Section 408. Requirements within the scope of this Act [*i.e.*, the FMIA] with respect to premises, facilities and operations of any establishment at which inspection is provided under . . . this Act, which are in addition to, or different than those made under this Act may not be imposed by any State.

§ 16, 81 Stat. 600 (21 U.S.C. 678). That provision also includes a savings clause: "This Act shall not preclude any State * * * from making requirement[s] or taking other action, consistent with this Act, with respect to any other matters regulated under this Act." *Ibid.*

2. As originally enacted, California Penal Code § 599f prohibited certain actors from "buy[ing], sell[ing], or receiv[ing] a nonambulatory animal," Cal. Penal Code § 599f(a) (West 1995), or "hold[ing] a nonambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises," *id.* § 599f(b). Section 599f(a) by its terms did not apply to slaughterhouses "inspected by [USDA]"; Section 599f(b) did not contain such a clause, and so apparently applied to all slaughterhouses, though USDA is unaware of any prosecution in connection with a federally inspected slaughterhouse. A violation was punishable by a maximum of six months of imprisonment and/or a $1000 fine. *Id.* §§ 19, 599f(d) (West 1995).

Section 599f was amended in 2008. 2008 Cal. Legis. Serv. ch. 194 (West). The amendment extended Section 599f(a)'s existing bans to all slaughterhouses, including those that are federally inspected. Cal. Penal Code § 599f(a). It required immediate euthanizing of any non-

ambulatory animal. *Id.* § 599f(c). It added a prohibition on "process[ing], butcher[ing], or sell[ing] meat or products of nonambulatory animals for human consumption." *Id.* § 599f(b). And it increased the maximum penalty for violating Section 599f to one year of imprisonment and a $20,000 fine. See *id.* § 599f(h).[2]

3. Petitioner is an association of meat packers and processors, including operators of swine slaughterhouses. Compl. ¶¶ 2-3, 7. Petitioner sued California officials seeking to prevent the enforcement of Section 599f against federally inspected swine slaughterhouses.

The district court granted petitioner's motion for a preliminary injunction preventing enforcement of Section 599f at any federally inspected swine slaughterhouse. Pet. App. 18a-53a. The court concluded that 21 U.S.C. 678 expressly preempts Section 599f because the California law "alters the process and methods for the receipt of animals, the determination of the animal as 'disabled' or 'nonambulatory,'" and the rules regarding "handling of the nonambulatory animal." Pet. App. 36a-37a. The court explained that the FMIA and its implementing regulations "permit a slaughterhouse to set aside for further inspection an animal that is nonambulatory," but that Section 599f "expressly requires that the same animal be

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[2] The 2008 amendment preserved Section 599f(e)'s regulation of how slaughterhouses may move nonambulatory animals: "While in transit or on the premises of a * * * slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance." The court of appeals agreed that petitioner was likely to succeed on the merits of its preemption challenge to Section 599f(e), but it vacated the preliminary injunction and remanded for findings about irreparable injury and the balance of the equities with respect to Section 599f(e) in particular. Pet. App. 16a-17a. The parties do not challenge that narrow remand order.

'immediately' euthanized." *Id.* at 37a. The court therefore held that Section 599f "imposes inspection requirements upon federally inspected slaughterhouses which are in addition to or different than FMIA," and is expressly preempted by 21 U.S.C. 678. Pet. App. 37a.

The district court rejected respondents' argument that a nonambulatory animal is a "type of meat" that a State could choose to exclude from being introduced into the human food supply altogether, as it might with "horse meat or dog meat or rat meat." Pet. App. 38a-39a. "A pig is a pig. A pig that is laying down is a pig. * * * California permits pigs to be produced for human consumption," and "[h]aving allowed pigs and swine to enter the food supply, California cannot alter the federally mandated requirements of inspection." *Id.* at 39a. The district court also concluded that Section 599f conflicts with the FMIA "because it alters the federally mandated procedure once an animal is identified as disabled." *Id.* at 42a-43a. The district court declined to reach petitioner's additional arguments that Section 599f is unconstitutionally vague and violates the Commerce Clause. *Id.* at 43a.

The district court entered a preliminary injunction. Pet. App. 44a-52a. It found that petitioner "is faced with an immediate threat of irreparable harm" from the conflict between Section 599f and the FMIA and the threat of criminal penalties. *Id.* at 48a. The court found the equities favored enjoining enforcement of Section 599f in light of the "interest of protecting the quality of the food supply and the quantity of meat processed for human consumption, and because adequate enacted law minimizes the potential risk." *Id.* at 52a.

4. a. The court of appeals vacated the preliminary injunction and remanded. Pet. App. 1a-17a. It first con-

cluded that 21 U.S.C. 678 does not expressly preempt Section 599f because, in the court's view, Section 599f does not address the "premises, facilities [or] operations" of slaughterhouses, but rather "regulates the kind of animal that may be slaughtered." Pet. App. 9a. The court reasoned that "the FMIA establishes inspection procedures to ensure animals that are slaughtered are safe for human consumption, but this doesn't preclude states from banning the slaughter of certain kinds of animals altogether." *Ibid.*

The court of appeals criticized the district court's analysis as limiting a State to "excluding animals from slaughter on a species-wide basis." Pet. App. 10a. It concluded instead that a State is free to "decide which animals may be turned into meat" based on "a host of practical, moral and public health judgments that go far beyond those made in the FMIA." *Ibid.* The court acknowledged that "a state may go too far in regulating what 'kind of animal' may be slaughtered," if it "effectively establish[es] a parallel state meat-inspection system" by "styl[ing] new [inspection] standards as a regulation of the 'kind of animal' that may be slaughtered." *Id.* at 10a-11a. But the court decided this case did not require it to "decide what limits the express preemption provision places on such regulations." *Id.* at 11a.

The court of appeals also concluded that Section 599f survived analysis under principles of conflict preemption. The court pointed out that "[i]t's not physically impossible to comply with both section 599f and the FMIA," as "nothing in the FMIA *requires* the slaughter of downer animals for human consumption," and "no slaughterhouse operator would be fined by federal authorities if he gave nonambulatory animals medical care and put them up for adoption as pets." Pet. App. 12a. Rather, on the

court's understanding, "[f]ederal regulations require inspection *if* downer animals are to be slaughtered." *Ibid.*

b. The court of appeals denied petitioner's petition for rehearing, Pet. App. 57a-59a, but stayed its mandate pending disposition of the certiorari petition, see *id.* 54a-56a; Fed. R. App. P. 41(d)(2)(B). Accordingly, the district court's preliminary injunction remains in force.

DISCUSSION

The court of appeals erred in holding that the FMIA does not expressly preempt the challenged portions of Section 599f. The court's reasoning that Section 599f is spared because it regulates the "kinds of animal" that may be slaughtered, Pet. App. 9a, is misguided. What matters is that Section 599f imposes "requirements" "with respect to" slaughterhouse "operations" that are "within the scope of [the FMIA]" but that are "in addition to, or different than" requirements prescribed under the FMIA. 21 U.S.C. 678. Section 599f is therefore expressly preempted.

Section 599f intrudes on a federal scheme designed not only to ensure the safety of particular carcasses for human consumption, but also to implement a national policy of humane handling and to detect diseases (*e.g.*, foot-and-mouth disease) that could destabilize the Nation's meat supply by devastating livestock populations. The decision below thus threatens to disrupt the federal inspection regime, or else put state officials and FSIS inspectors at loggerheads over basic matters of slaughterhouse operations. A correct application of 21 U.S.C. 678 would resolve all those concerns in straightforward fashion in favor of the federal regime. Under the traditional considerations, however, this Court's review is not

warranted. The Ninth Circuit's decision is interlocutory and does not implicate a division of appellate authority. Moreover, it presently affects only California, where a relatively small fraction of the Nation's swine slaughter is conducted, and it is possible that conflicts with the federal regime could be minimized.

A. The Federal Meat Inspection Act Expressly Preempts Section 599f As Applied To Swine Slaughterhouses

The court of appeals erred in concluding that 21 U.S.C. 678 does not expressly preempt the challenged portions of Section 599f as applied to swine slaughterhouses. The court of appeals' reasons for that holding are unpersuasive and ignore the simple fact that Section 599f would dictate how federally regulated slaughterhouses must conduct operations involving nonambulatory animals.

1. The FMIA preempts state "[1] [r]equirements [2] within the scope of [the FMIA] [3] with respect to premises, facilities and operations of any establishment at which inspection is provided under [the FMIA], [4] which are in addition to, or different than those made under [the FMIA]." 21 U.S.C. 678. The portions of Section 599f challenged here satisfy each of those conditions.

Requirements. The mandatory language of Section 599f makes clear it states "requirements" in the ordinary sense of the word. As explained in detail below, most of the challenged portions of Section 599f—the bans on "receiv[ing]" and "hold[ing]" nonambulatory swine, and on "process[ing]" and "butcher[ing]" their meat—are direct regulations of slaughterhouse activities committed to exclusive federal control through 21 U.S.C. 678.

Whether Section 599f(b)'s ban on "sell[ing] meat or products of nonambulatory animals for human consump-

tion" is a "requirement" under 21 U.S.C. 678 calls for further analysis. The FMIA does not in general expressly preempt state regulation of the commercial sales activities of slaughterhouses (though the second sentence of 21 U.S.C. 678 preempts "[m]arking, labeling, packaging, [and] ingredient requirements," see *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 528-532 (1977)). But in the context of Section 599f's other prohibitions, the sale ban cannot fairly be understood as mere economic regulation of a commercial market. Moreover, the record here is that the sales ban was in fact intended to regulate slaughtering activities through economic pressure. As the sponsor of the 2008 amendment explained, the revised Section 599f "will create an economic disincentive to [certain slaughterhouse] practices [regarding nonambulatory animals] by prohibiting the sale of any meat or products from such animals." C.A. App. 289. The sales ban in Section 599f therefore is as much a "requirement" "with respect to" slaughterhouse "operations" as Section 599f's other provisions.

This Court has recognized that the word "requirement" in an express preemption provision has expansive reach. *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), interpreted an express preemption clause providing that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to [certain aspects of cigarette promotion]." *Id.* at 515. The *Cipollone* plurality found that provision to "sweep[] broadly," and emphasized that it embraced common-law damage actions because "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling pol-

icy." *Id.* at 521 (citation omitted); accord *id.* at 548-549 (opinion of Scalia, J.). The underlying principle is that, where federal supremacy is concerned, a state law that by design exerts clear economic pressure on a federally regulated activity is no less a "requirement" than a naked regulation would be. That principle logically applies whether the state law is a criminal ban (as here) or a cause of action in tort (as in *Cipollone*).

Within the scope of the FMIA. The challenged provisions of Section 599f are within the "scope" of the FMIA. Spatially, a slaughterhouse subject to the FMIA embraces delivery vehicles once they have entered its premises, see FSIS Directive 6900.2 (rev. 1, Nov. 25, 2003) (Part I V.B), as well as "every part of [the] establishment" where "meat food products [are] prepared for commerce," 21 U.S.C. 606(a) (Supp. III 2009). Thus, for the entire time the animal is within the slaughterhouse's premises, the animal and its products are within the physical scope of the FMIA's application.

Furthermore, each stage of slaughterhouse operations at which Section 599f might apply is within USDA's expansive regulatory authority under the FMIA:

- USDA regulates the humane handling of swine—whether nonambulatory disabled, nonambulatory but not disabled, or otherwise—upon the animals' arrival at the slaughterhouse, even before the animals are identified to FSIS for inspection. See, *e.g.*, 44 Fed. Reg. 68,813 (1979) (promulgating 9 C.F.R. 313.1-.2, regulating humane handling); see also FSIS Directive 6100.1 (rev. 1, Apr. 16, 2009) (VIII.A.1) ("All animals that are on the premises of the establishment, on vehicles that are on the premises, or animals being handled in connection with slaughter (e.g., livestock on trucks being

staged for slaughter) are to be handled humanely.").[3]

- The ante-mortem inspection of nonambulatory swine presented to FSIS for inspection is subject to longstanding regulations under the FMIA. See, *e.g.*, 35 Fed. Reg. 15,554 (1970) (promulgating Part 309 ante-mortem inspection regulations and Part 311 disposition regulations on the authority of, *inter alia*, the FMIA).
- The processing and butchering of carcasses into meat and meat food products is regulated under the FMIA. See, *e.g.*, 35 Fed. Reg. at 15,554 (promulgating Part 318 processing regulations on the authority of, *inter alia*, the FMIA).

Accordingly, the provisions of Section 599f addressing the same subjects are also within the scope of the FMIA.

With respect to operations. The provisions of Section 599f address slaughterhouse "operations." The FMIA contains two preemption provisions and a savings clause in 21 U.S.C. 678, which divide the Act's concerns into several subject matters: "premises, facilities and operations"; "recordkeeping"; "[m]arking, labeling, packaging, [and] ingredient requirements"; and "other matters." In

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[3] The fact that USDA's Part 313 humane-handling regulations reflect a policy originally enacted by Congress in a law separate from the FMIA does not place those regulations outside "the scope of [the FMIA]," 21 U.S.C. 678. Congress itself announced in HMSA 1978 that it was "amend[ing] the [FMIA] to *require* that meat inspected and approved *under such Act* be produced" in accordance with the policy in HMSA. Pmbl., 92 Stat. 1069 (emphasis added). And USDA understood in promulgating the Part 313 humane-handling regulations that it was "amend[ing] the Federal meat inspection regulations to implement Pub. L. 95-445," i.e., the HMSA 1978, which amended the FMIA. 44 Fed. Reg. at 68,809.

that context, the "operations" of a slaughterhouse are best understood as "action[s] done as a part of practical work or involving practical application of a * * * process" at the slaughterhouse. *Webster's New International Dictionary* 1707 (2d ed. 1958). Section 599f's requirements are "with respect to" such operations just as the FMIA's humane-handling and inspection requirements are. Both federal and California law address practical aspects of how animals must be handled by the slaughterhouse in connection with slaughter, and the conditions under which processing of the carcasses into meat and meat food products must occur.[4]

In addition to, or different than. Section 599f's requirements regarding nonambulatory swine are not the same as those prescribed under the FMIA. FSIS regulations do not prohibit the receipt or holding of nonambulatory swine; to the contrary, they contemplate that such animals will be received and address how they will be humanely handled and held. See 9 C.F.R. 309.2(b) (governing nonambulatory disabled livestock); FSIS Directive 6900.1 (Part One VI.C; Part Two I.D) (same); 9 C.F.R. 313.2(a)-(c) (governing driving of livestock). Likewise, there is no flat prohibition in USDA regulations on processing the meat of nonambulatory swine for sale; rather, there is a system of ante-mortem and post-mortem inspections designed to pass carcasses of nonambulatory swine for human consumption in whole or in

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[4] The FMIA's savings clause therefore does not rescue Section 599f. It permits States to "mak[e] requirements or tak[e] other action, consistent with [the FMIA], with respect to any other matters regulated under [the FMIA]." 21 U.S.C. 678. Because Section 599f seeks to regulate slaughterhouse "operations" properly "within the scope of [the FMIA]," it cannot be said to regulate the "other matters" preserved by the savings clause. *Ibid.*

part if possible. See 9 C.F.R. 309.2(n); 9 C.F.R. Pt. 311; see also *Rath Packing*, 430 U.S. at 530-532 (applying the "in addition to, or different than" language in the second sentence of 21 U.S.C. 678).

2. The congressional findings that preface the FMIA explain the need for federal inspection of meat bound for interstate and foreign commerce:

> Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers.

21 U.S.C. 602. Because "the major portion [of meat and meat food products] moves in interstate or foreign commerce," *ibid.*, achieving the FMIA's purposes requires a regulatory regime for slaughterhouses that is generally uniform and unencumbered by state-to-state variations.

Reflecting a balance of interests, however, the FMIA does not subject every aspect of slaughterhouse regulation to national uniformity. For example, the savings clause in 21 U.S.C. 678 provides that the States retain authority over "other matters" not addressed in the express preemption clauses, so long as their laws are "consistent with" the FMIA. The FMIA also authorizes cooperative federal-state implementation of state meat-inspection regimes for slaughterhouses producing meat only for intrastate consumption. See 21 U.S.C. 661(a). That provision was added to the FMIA in 1967 in the same amendment that introduced the express preemp-

tion provision. See Wholesome Meat Act §§ 15, 16, 81 Stat. 595, 600.

If a State is concerned only about meat inspection at intrastate slaughterhouses, it may seek FSIS approval of an intrastate inspection regime, as described above. Twenty-seven States have done so; California is not among them. See FSIS, *List of Participating States*, http://www.fsis.usda.gov/regulations_&_policies/Listing_of_Participating_States/index.asp (Aug. 13, 2007). Alternatively, any interested person (including a State) may petition USDA to revise its FMIA inspection regulations (or to use authorities other than the FMIA to regulate slaughterhouse operations). See 9 C.F.R. Pt. 392. Indeed, USDA has been quite active on matters concerning nonambulatory animals: Through a series of measures in 2004, 2007, and 2009, USDA has required the condemnation of nonambulatory disabled full-grown cattle. See note 1, *supra*. And USDA recently solicited comment on two rulemaking petitions to extend that cattle rule to veal calves, or—of relevance to petitioner's members who operate swine slaughterhouses—to all livestock. 76 Fed. Reg. 6572 (2011).[5]

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[5] The pending rulemaking petition regarding all livestock would not, if granted, moot this case. That petition asks only for a rule that nonambulatory disabled animals "be condemned and humanely euthanized in accordance with 9 C.F.R. 309.13." Farm Sanctuary, *Petition to Amend 9 C.F.R. § 309(e)* 2, http://www.fsis.usda.gov/PDF/Petition_Humane_Handling.pdf (Mar. 15, 2010). By contrast, Section 599f(c) requires "immediate action to humanely euthanize the animal," without regard to the federal inspection and condemnation procedures that apply to animals once presented for inspection. Thus, even if USDA adopted the rule Farm Sanctuary seeks, at least Section 599f(c) would still be "in addition to, or different than" USDA's regulations under the FMIA, 21 U.S.C. 678, and therefore still subject to the instant challenge.

What a State may not do under the FMIA is engraft its preferred additions onto the federal regime. Yet that is precisely the aim and effect of Section 599f. As the sponsor of the 2008 amendment to Section 599f explained, the amendment was necessary in his view because under "the USDA inspection system, there is * * * no adequate system in place to prevent [nonambulatory disabled] animals from continuing to enter our food supply." C.A. App. 195. The FMIA's preemption provision is intended to restrain such impulses toward disuniformity in the operations of slaughterhouses serving the interstate market.

3. The Ninth Circuit concluded that 21 U.S.C. 678 does not preempt Section 599f because the California law regulates "the kind of animal that may be slaughtered," and the FMIA "doesn't preclude states from banning the slaughter of certain kinds of animals altogether." Pet. App. 9a. That reasoning is wrong because it draws an irrelevant distinction and fails to respect 21 U.S.C. 678's focus on "requirements."

Even if Section 599f is described as regulating a "kind of animal," the law is necessarily put into practice through requirements with respect to slaughterhouse operations within the FMIA's scope. It is therefore expressly preempted. The court of appeals, however, suggested something more was necessary for preemption: It acknowledged that "[i]t is possible that a state may go too far in regulating what 'kind of animal' may be slaughtered," Pet. App. 10a, and it offered hypothetical examples of "kind of animal" regulations that "could effectively establish a parallel state meat-inspection system," *id.* at 11a. But the court offered no statutory basis for its view that only some "kind of animal" regulations would be preempted, nor a principle for discerning which regu-

lations "go too far." *Id.* at 10a. Those analytical gaps reveal that characterizing a state law as regulating what "kind of animal" may be slaughtered is fundamentally unhelpful in deciding whether the FMIA preempts the law.

The court of appeals' "kind of animal" construct was borrowed from *Cavel International, Inc.* v. *Madigan*, 500 F.3d 551 (7th Cir. 2007), cert. denied, 554 U.S. 902 (2008), and *Empacadora de Carnes de Fresnillo* v. *Curry*, 476 F.3d 326 (5th Cir.), cert. denied, 550 U.S. 957 (2007), which both upheld state prohibitions on the slaughter of horses for human consumption. See Pet. App. 9a (explaining the state laws at issue governed only "what types of meat may be sold for human consumption in the first place") (quoting *Empacadora*, 476 F.3d at 333).

Even if it is assumed, *arguendo*, that *Cavel* and *Empacadora* were correctly decided, it is not because horses are a "kind of animal," but rather because the bans at issue did not require anything with respect to slaughterhouse operations within the FMIA's scope. Most obviously, the quality of being a horse is immutable and known to all involved well before the animal is within the physical or regulatory reach of the FMIA. Cf. Pet. App. 39a ("A pig is a pig. A pig that is laying down is a pig."). By contrast, immobility is a mutable characteristic that may change even while the animal is on the premises of a federally regulated slaughterhouse. For example, the record below shows that swine that are nonambulatory upon arrival at a slaughterhouse often suffer only from fatigue and stress and are able to stand and walk after rest and monitoring. See C.A. App. 885 (Terrill Decl. ¶ 5). Conversely, USDA regulations governing the good repair of slaughterhouse facilities illustrate that dis-

abling injury to an animal's limbs on slaughterhouse premises is not unknown. See 9 C.F.R. 313.1. The Ninth Circuit's decision allowing California to regulate slaughterhouse operations based on criteria that can and do manifest after animals are already on a slaughterhouse's premises cannot be squared with the FMIA's prohibition of such state law requirements.

B. This Case Does Not Satisfy The Traditional Criteria For Certiorari

The Ninth Circuit's decision is misconceived and threatens to disrupt the FSIS's inspection activities. Nonetheless, the decision does not implicate a division of appellate authority and its effect is presently limited to California, where a relatively small fraction of the Nation's swine slaughter is conducted. Thus, although this Court could productively review the case at this stage, on balance it does not demand the Court's immediate attention.

1. The federal regulation of slaughterhouses is designed in part to ensure the safety of particular carcasses for human consumption. But it also serves to detect serious diseases—such as foot-and-mouth disease—that may be spreading through livestock populations, threatening widespread economic harm and disruption of the meat

supply.[6] And it implements a uniform federal policy regarding the humane handling of livestock.

The court of appeals' decision to let Section 599f stand could frustrate FSIS's inspection activity in California by requiring immediate euthanasia before ante-mortem inspections are conducted. Even if some ante-mortem inspections went forward, Section 599f could put state officials and FSIS inspectors at loggerheads over basic matters of slaughterhouse operations: What is sufficient to deem an animal "nonambulatory" under Section 599f(c)? How quickly must ante-mortem inspection take place so that an animal believed to be nonambulatory may be "immediate[ly] * * * euthanize[d]" under Section 599f(c)? What if no federal inspector is immediately available? Must federal inspectors reorganize their inspection priorities to accommodate the urgency Section 599f appears to place on euthanasia? What if an animal becomes nonambulatory while in line to be slaughtered?

Similar disputes could arise over humane handling. For example, a federal inspector could conclude that nonambulatory swine that are not disabled, but merely tired and overheated, would most humanely be handled by revival with food, water, and shade. But Section 599f would seem to require immediate euthanasia, even if that

---

[6] Ante-mortem inspection in particular is often the best way of detecting such diseases, especially when standard diagnosis requires observing or taking the temperature of a live animal. See generally American Ass'n of Swine Vets. Amicus Br. 4-11. For example, as FSIS's training materials for public health veterinarians explain, the initial clinical symptoms of foot-and-mouth disease for swine are "fever * * *, anorexia, reluctance to move, and squeal[ing] when forced to move," followed by vesicle (blister) formation. FSIS, *Disposition/Food Safety: Reportable and Foreign Animal Diseases* 66 (Jan. 29, 2009). Of those symptoms, only vesicles would be detectable post mortem, and would not be visible at all on a skinned and dressed carcass.

more drastic (and economically wasteful) approach was unnecessary.

Caught in the middle of such a disagreement, slaughterhouse operators or employees facing criminal penalties may submit to the California law, undermining the federal scheme. And although we assume California's prosecutors would exercise suitable discretion, the court of appeals' ruling implies that FSIS inspectors themselves could in principle be criminally charged as well. See Cal. Penal Code § 31 (West 1999) (treating persons who "aid and abet [a crime's] commission, or, not being present, have advised and encouraged its commission" as principals in the crime).

California might ameliorate the situation somewhat (even if it could not save Section 599f from express preemption) by interpreting terms in the statute such as "nonambulatory" and "immediate" in a way that eliminated the most direct conflicts with the federal scheme, described above. But California has not offered such limiting constructions in this litigation, a silence that amplifies the concern that Section 599f will intrude on the federal scheme if it goes into effect.

2. That said, the petition does not satisfy the traditional criteria warranting certiorari. The decision below does not conflict with any other appellate decision, and it presently affects only California, where a relatively small fraction of the Nation's slaughtering takes place: In March of this year, California slaughterhouses handled (by head count) about 2% of the Nation's swine and about 6% of the Nation's other FMIA-regulated species (cattle, calves, sheep, and lambs). Nat'l Agric. Stats. Serv., USDA, *California Livestock Review* (Apr. 29, 2011), http://www.nass.usda.gov/Statistics_by_State/California/Publications/Livestock/201104lvsrv.pdf.

The court of appeals' decision is also interlocutory. It may leave open the possibility that the concerns discussed above could be addressed through application of conflict-preemption principles on a more complete record. See Pet. App. 14a. The court of appeals also left open for remand the questions whether Section 599f is void for vagueness or inconsistent with the Commerce Clause. *Id.* at 6a n.2, 17a.[7] And because Section 599f was enjoined shortly after its effective date, it is presently unclear how aggressively California will enforce it, or how slaughterhouses will react. On the one hand, the pre-amendment version of Section 599f(b) apparently required immediate euthanasia of nonambulatory animals at federally inspected slaughterhouses, yet USDA is unaware of any actual prosecution under the law. On the other hand, the amendment to Section 599f was directed primarily at federally inspected slaughterhouses, and it was justified as addressing perceived inadequacies in USDA's regulations. See p. 18, *supra*.

---

[7] That said, the Ninth Circuit's opinion casts substantial doubt on the viability of conflict-preemption theories by suggesting (incorrectly) that slaughterhouses can avoid all FSIS oversight by euthanizing a nonambulatory animal and spiriting it away from federal inspectors. See Pet. App. 12a. Moreover, Commerce Clause challenges to state slaughterhouse regulation have generally failed, see *Empacadoru*, 476 F.3d at 335-337; *Cavel*, 500 F.3d at 555-558.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2011

AMICUS CURIAE BRIEF

RECORD AND BRIEFS
MOTION FILED
SEP 10 2010

No. 10-224

In The
Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

EDMUND G. BROWN JR., in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA,

Respondents,

and

THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE AMERICAN ASSOCIATION OF SWINE VETERINARIANS AND THE NATIONAL PORK PRODUCERS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF THE AMERICAN ASSOCIATION OF SWINE VETERINARIANS AND THE NATIONAL PORK PRODUCERS COUNCIL FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2, the American Association of Swine Veterinarians ("AASV") and the National Pork Producers Council ("NPPC") respectfully move this Court for leave to file the attached brief as *amici curiae* in the above-captioned case. Counsel of record for all parties received timely notice of the intention of the AAVS and NPPC to file an *amici curiae* brief at least 10 days prior to the due date. The Petitioner has consented to AASV's and NPPC's participation in this matter. An email attesting to its consent has been submitted to this Court. In addition, Intervenor American Meat Institute consents to AASV's and NPPC's participation in this matter. An email attesting to its consent has been submitted to this Court. To date, no response has been received from the Respondents as to whether they consent to the filing of this brief.

The AASV is a professional association of veterinarians who care for swine. The organization has approximately 1,300 members involved in practice, industry, and academia in more than 40 countries. The mission of the AASV is to increase the knowledge of swine veterinarians by promoting the development and availability of the resources which enhance the effectiveness of professional activities,

creating opportunities which inspire personal and professional growth, advocating science-based approaches to industry issues, encouraging personal and professional interaction, and mentoring students to encourage life-long careers as swine veterinarians. AASV's website can be found at www.aasv.org.

The NPPC is a 26 U.S.C. § 501(c)(5) nonprofit corporation whose membership consists of forty-three state pork producer associations. As the national trade association for pork producers, the NPCC is dedicated to enhancing opportunities for the nation's thousands of pork producers. The NPPC conducts public policy outreach on behalf of its members and advocates for the passage and implementation of laws and regulations conducive to the production and sale of American pork in both domestic and international markets. The NPPC's website can be found at www.nppc.org.

This case bears directly on meat inspection practices across the country. Swine veterinarians and pork producers have a strong interest in providing input into this issue, as it will directly affect their livelihoods and practices. Swine veterinarians and pork producers are well-situated to explain the impact of this case on both hogs and consumers. Therefore, AASV and NPPC respectfully request the

opportunity to advise this Court more fully on the urgency of granting the petition.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*

The American Association of Swine Veterinarians and the National Pork Producers Council submit this brief as *amici curiae* in support of the National Meat Association's Petition for Writ of Certiorari.[1] The interests of the *amici* are set out in the accompanying motion.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision permits California to criminalize a federally-mandated process for inspecting and disposing of non-ambulatory pigs. The decision places pork producers and slaughterhouses in the untenable position of facing potential criminal liability under state law in order to comply with federal law. It also endangers public health by short-circuiting the federal government's ante-mortem inspection regime. This Court should grant certiorari to bring the California law (and the Ninth Circuit) in

[1] Counsel of record for all parties received notice of the intention of the AAVS and NPPC to file an *amici curiae* brief at least 10 days prior to the due date. The National Meat Association and the American Meat Institute have consented to the filing of this brief after receiving timely notice from the *amici curiae*. No response was received from the Respondents with regard to consent. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

line with the uniform meat inspection regime created by the Federal Meat Inspection Act, 21 U.S.C. § 601, *et seq.* (the "FMIA").

ARGUMENT

I. California Penal Code § 599f(c) makes it a criminal offense to hold a non-ambulatory pig in California without immediately euthanizing it. As the petition sets forth, this prohibition runs head-first into the FMIA's express preemption provision: "Requirements within the scope of [FMIA] with respect to the premises, facilities and operations of any establishment at which inspection is provided . . . which are *in addition to, or different than* those made under this chapter may not be imposed by any state." 21 U.S.C. § 678 (emphasis added). Seeking to avoid the obvious preemptive effect of § 678, the court of appeals reasoned that California's law regulates "the kind of animal" that may be slaughtered, not the "premises, facilities, [or] operations" of slaughterhouses. Pet. App. 9a. Beyond the flaws in the court of appeal's reasoning with regard to California Penal Code §§ 599f(a) or (b), which are set forth in detail in the petition, this logic manifestly cannot apply to §599f(c).[2]

[2] *Amici* agree with the Petitioner that the court of appeals erred by ruling that a "non-ambulatory pig" is a "kind of animal" separate and apart from a "pig." A non-ambulatory pig is still a

(Continued on following page)

Contrary to the court of appeal's decision, § 599f(c) purports to govern the operations of any California slaughterhouse confronted with a non-ambulatory pig, requiring that the pig be immediately euthanized. The regulations implementing the FMIA, however, impose markedly different obligations. Federal inspectors at slaughterhouses are required to perform ante-mortem inspection of all livestock "offered for slaughter." 9 C.F.R. § 309.1. If, during this inspection, livestock are found to be non-ambulatory, they must "be identified as U.S. Suspects and disposed of as provided in § 311.1 of this subchapter unless they are required to be classed as condemned under § 309.3." *Id.*; 9 C.F.R. § 309.2(b). 9 C.F.R. § 311.1, in turn, provides specific disposal procedures depending on the cause of the animal's infirmity. By mandating that slaughterhouses immediately euthanize non-ambulatory pigs offered for slaughter, the California law short-cuts the federal process. Indeed, California makes it a *crime* to follow

---

pig. Meat produced from healthy non-ambulatory pigs is indistinguishable from the meat produced from healthy ambulatory pigs. Healthy pigs sometimes lie down due to fatigue. *See* Joe Vansickle, *Will 'Downer' Sows Be Next?* National Hog Farmer, July 15, 2008, *available at* http://nationalhogfarmer.com/behavior-welfare/0715-groups-usda-ban/ (last visited August 18, 2010) ("Pigs become fatigued from overexertion, turning them into downers when they are not given proper rest."); Tyler Kelley, *Don't Let Stress, Heat be a Downer for Pigs*, Pork Magazine, May 2, 2005, *available at* http://www.porkmag.com/directories.asp?pgID=728&ed_id=3377 (last visited August 18, 2010). Doing so, however, does not make them any less "pigs."

the federal procedures instead of putting the animal down. Plainly, the California statute imposes requirements "different than" those mandated by the federal regulations. It is thus preempted by the FMIA's express language. 21 U.S.C. § 678.

II. This is no ordinary case of a court misreading a statute. The Ninth Circuit's reasoning forces a slaughterhouse that discovers a non-ambulatory pig offered for slaughter to commit a crime under the California statute in order to comply with federal regulations.[3] But even more significant than the Catch-22 it foists on slaughterhouses, the court of appeal's misreading of the statute will negatively impact public health.

Federal veterinarians and their trained inspectors conduct both ante-mortem and post-mortem inspections of non-ambulatory swine for a very important reason: both forms of inspection of the animal are required to find and verify the presence of a communicable disease. Ante-mortem inspection is particularly critical in serving as a front-line of defense against the spread of Classical Swine Fever (hog cholera) and Foot & Mouth Disease (a type of vesicular disease). Both of these foreign animal diseases ("FAD's") must be detected early to prevent

---

[3] Such confusion would only be exacerbated if Ninth Circuit's decision is affirmed and more states pass laws that attempt to impact the process of animal inspection at slaughterhouses. Petition at 33-34.

their spread. Federal inspectors have discovered suspected cases of FAD's at slaughterhouses in the past. *See, e.g.*, Devlin Barrett, *Officials brace for foot-and-mouth scare*, USA Today, October 15, 2007, *available at* http://www.usatoday.com/news/washington/2007-10-15-2261637160_x.htm (last visited September 7, 2010) ("When there were fears of a foot-and-mouth outbreak in the Midwest this summer, the White House received secret briefings that highlighted the potential for old farm diseases to be new national security threats.").

In fact, the USDA's Food Safety and Inspection Service (FSIS) has issued a directive specifically describing the responsibility of federal slaughter-house inspectors to prevent the spread of FAD's. FSIS Directive 6000.1, Rev. 1, Part VI & VII, *available at* http://www.fsis.usda.gov/OPPDE/rdad/FSISDirectives/6000.1Rev1.pdf (last visited September 7, 2010). An FSIS entry-level training module for public health veterinarians (PHV's) describing the threat of FAD's states:

> The volume of international passenger travel is steadily increasing. In 1980, 20 million passengers arrived in the United States on international flights. In 1995, this number rose 131 percent to 47 million (4). The airline industry expects this trend to continue. International travelers may unknowingly bring contaminated animal products from FAD infected countries. Contaminated foodstuffs have often served as a source of a FAD in the United States and other countries (5).

> As the world population grows and animal production intensifies, the risks and impacts of FAD incursions increase. Today, infection at one premises can affect 300,000 laying hens, 100,000 hogs, or 100,000 feedlot cattle. When one company owns a large number of animals, frequent and rapid interstate movement occurs. This movement can spread infection across many states before clinical signs are manifest in the source herd.

See FSIS, Entry Training for the PHV, "Reportable and Foreign Animal Diseases," at 5, *available at* http://www.fsis.usda.gov/PDF/PHVj-Reportable_and_Foreign_Animal_Diseases.pdf (last visited September 7, 2010). The spread of such FAD's would have staggering impact on the livestock industries if not prevented through early detection. *Id.*

The FSIS has created a comprehensive training program for the ante-mortem inspection of animals at the slaughterhouse. *See generally* FSIS, Livestock Slaughter Inspection Training, *available at* http://www.fsis.usda.gov/PDF/7b_LSIT_AnteMortem.pdf (last visited September 5, 2010). By depriving FSIS of information gained by conducting both inspections, California is tying the hands of federal inspectors and veterinarians in fighting the spread of dangerous illnesses among swine (and potentially humans). Some of this information can only be determined by viewing the animal in motion during the ante-mortem inspection. *Id.* at 5.

The FSIS Livestock Slaughter Inspection Training manual provides for various steps in the ante-mortem inspection process (and the medical rationale for those steps) as follows:

> Ante-mortem inspection consists of two steps:
>
> 1. Observe Animals at rest
> 2. Observe Animals in motion
>
> It is important to inspect the animals using both steps because certain abnormal signs, such as labored breathing, are easier to detect while the animals are at rest, while other abnormalities, such as lameness, are more easily detected while in motion. Since the regulations do not require in motion inspection from both sides, you must use your discretion during ante-mortem. You or your supervisor may determine that in motion inspection from both sides is necessary to determine if the animals are eligible to be passed for regular slaughter. An example of this may be in high pathology cattle plants with a greater incidence of acti, epithelioma, or injection site reactions which all can be unilateral in nature.

Id. at 5. Ante-mortem inspections serve at least two purposes: (1) to determine eligibility for slaughter, and (2) to serve as a front-line detector of communicable diseases. As this manual suggests, certain ailments can only be detected while viewing the animal in motion, which is impossible during a post-mortem inspection. In fact, the manual contains an

extensive list of symptoms of ailments that may only be determined through the abnormal body movement of the animal:

Abnormal Body Movement

Ante-mortem signs that indicate an animal may have a condition or disease referenced in the regulations can be associated with body movement and action, body position, condition, function, surfaces, discharges, and body odor. Some examples of the signs associated with body movement, action and position include:

1. Lameness or limping-sometimes the cause of lameness is rather obvious; sometimes not.

2. Stiffness and pain-lameness may be caused by arthritis in one or more joints.

3. Central Nervous System (CNS) diseases-certain diseases such as rabies and listeriosis can affect the brain and CNS. The animal may appear extremely nervous or restless, excessively anxious or upset, or stagger or circle.

4. Certain poisons and toxic residues that the animal has been exposed to may cause abnormal movement and action, such as staggering or circling.

5. Depression or disinterest may be a sign that the animal is in a dying or moribund state. A moribund animal may not respond to noises or other stimuli. Animals in a

moribund condition are not eligible for slaughter.

6. It is possible that an animal that is depressed or fails to respond normally to stimuli could be under the influence of a tranquilizer. Tranquilized animals are not eligible for slaughter. Tranquilizers and other drugs have specific withdrawal periods that must elapse before the animal is eligible for slaughter.

7. An animal may be disoriented and run into things or butt its head against objects.

8. Animals may scratch excessively or rub their hide against objects. Scratching and rubbing associated with hair loss may indicate that the animal has lice or mange infestation. Scabies is a mange condition that is a reportable disease. The veterinarian must report this condition to other health agencies. These agencies may want to take skin scrapings from the animal to confirm the diagnosis.

9. Animals may have muscle tremors or shivering, hold their head to one side, or have any number of abnormal gaits.

10. Animals may strain and assume abnormal body positions. For example, urinary or intestinal disorders may cause straining and abnormal positions such as arching of the back, tucking in of the

> abdomen (stomach), and extending the neck and tail.
>
> 11. An animal may have difficulty in rising or be unable to get up at all or be standing but unable to walk (or ambulate). These animals may be recumbent non-ambulatory or standing non-ambulatory for a variety of reasons ranging from an injury to severe illness or depression. All non-ambulatory livestock must be examined by the veterinarian. The veterinarian may choose to examine these animals where they are rather that move them to the U.S. Suspect pen to avoid unnecessary handling and pain or injury to the animal. All cattle that are non-ambulatory when presented for ante-mortem must be condemned.

Id. at 10-11. In addition, the manual requires that inspectors take the temperature of each animal during the ante-mortem inspection process, which is also impossible post-mortem. *Id.* at 10, 13. Certain animals are condemned on the basis of their body temperature alone. *Id.* at 13; 9 C.F.R. § 309.3(c). Taken together, these federal ante-mortem inspection procedures are critical in preventing the spread of diseases, such as hog cholera and vesicular disease. *See* 9 C.F.R. § 309.5 and 9 C.F.R. § 309.15.

By contrast, § 599f(c) turns federal veterinarians into coroners tasked only with the autopsies of a newly-expanded number of often-healthy non-ambulatory swine that were subject to immediate euthanization. By mandating "immediate" euthanization of such

animals, federal veterinarians and inspectors are deprived of the benefit of an examination of the "patient" while that pig is still alive. The retrieval of such ante-mortem data would be a crime under Section 599f, even though it would allow for the only means of detection of certain communicable diseases in swine. Catching a communicable disease early within a swine population could be critical in preventing the spread of the disease within the slaughterhouse. Section 599f places the health of both swine and humans at unnecessary risk. Immediately euthanizing non-ambulatory swine does nothing to improve the public health. Quite the opposite, it threatens the public health by preventing ante-mortem inspection of "downer" swine.[4]

As this Court has previously stated, the FMIA provides for an elaborate system of pre-slaughter animal inspection to protect the public health. *See Pittsburgh Melting Co. v. Totten*, 248 U.S. 1, 4-5 (1918) ("The [FMIA] provides an elaborate system of inspection of animals before slaughter, and of carcasses after slaughter and of meat-food products,

---

[4] The process of ante-mortem inspection can be viewed as an early-warning detection system that, when in operation, allows the on-site federal veterinarians to make the crucial decision of whether to separate or quarantine the entire swine herd. Post-mortem inspection alone would not allow for this type of early detection of communicable diseases. Regardless, § 599f supersedes the federal regulations that would allow for a non-ambulatory pig to be safely separated from the rest of the herd and placed in a covered pen. *See* 9 C.F.R. § 313.2(d)(1).

with a view to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products in interstate and foreign commerce."). That system will be disturbed unless this Court corrects the Ninth Circuit's error.

CONCLUSION

For the foregoing reasons, as well as those in the petition, certiorari should be granted. Alternatively, this Court should call for the views of the Solicitor General. The federal government has not been heard from on this important question of pre-emption.

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September 10, 2010

JOINT APPENDIX

No. 10-224

In The Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

KAMALA D. HARRIS, et al.,

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On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Eastern District of California
Civil Docket for
Case No. 1:08-cv-01963-LJO-DLB

National Meat Association v. Brown, et al.

Date Filed	#	Docket Text
12/23/2008	1	COMPLAINT for Declaratory and Injunctive Relief against all defendants by National Meat Association. Attorney Schmidt, Kent Jeffrey added. (Attachments: #1 Civil Cover Sheet) (Schmidt, Kent) (Entered: 12/23/2008)
12/23/2008	2	MOTION for PRELIMINARY INJUNCTION by National Meat Association. (Attachments: #1 Memorandum in Support of Motion for Preliminary Injunction, #2 Proposed Order, #3 Schmidt Declaration in Support of Motion for PI, #4 Schmidt Declaration Exhibits 1-5, #5 Goodner Declaration in Support of Motion for PI, #6 Masters Declaration in Support of Motion for PI, #7 Carpenter Declaration in Support of Motion for PI, #8 Terrill Declaration in Support of Motion for PI) (Schmidt, Kent) (Entered: 12/23/2008)
12/30/2008	20	AMENDED MOTION for PRELIMINARY INJUNCTION amending 2 MOTION for PRELIMINARY INJUNCTION by National Meat Association. Motion Hearing set

		for 1/28/2009 at 08:30 AM before District Judge Lawrence J. O'Neill. (Attachments: #1 Memorandum in Support of Motion, #2 Proposed Order granting Preliminary Injunction, #3 Declaration of Schmidt in support of motion, #4 Schmidt Declaration Exhibits 1-5, #5 Declaration of Carpenter in support of motion, #6 Declaration of Goodner in support of motion, #7 Declaration of Masters Declaration in support of motion, #8 Declaration of Terrill in support of motion) (Schmidt, Kent) (Entered: 12/30/2008)
01/27/2009	46	MOTION to INTERVENE by Humane Society of the United States, Farm Sanctuary Inc., Humane Farming Association, Animal Legal Defense Fund. Attorney Brandt, Peter Alfred added. Motion Hearing set for 2/24/2009 at 08:30 AM in Courtroom 4(LJO) before District Judge Lawrence J. O'Neill. (Attachments: #1 Memorandum in Support of Motion to Intervene, #2 Proposed Order Granting Leave to Intervene, #3 Exhibit 1 Proposed Answer to Plaintiff NMA's Complaint, #4 Exhibit 2 Proposed Memorandum in Opposition to NMA's Motion for Preliminary Injunction, #5 Exhibit 3 Declaration of Nancy Perry in Support of Motion to Intervene, #6 Attachments A-K to Perry Decl

		in Support of Motion to Intervene) (Brandt, Peter) (Entered: 01/27/2009)
01/27/2009	47	EXHIBIT 4 Declaration of Michael Greger re 46 MOTION to INTERVENE filed by Animal Legal Defense Fund, Humane Farming Association, Farm Sanctuary Inc., Humane Society of the United States. (Attachments: #1 Attachments A-B Greger Decl in Support of Motion to Intervene, #2 Attachments C-I Greger Decl in Support of Motion to Intervene, #3 Attachments J-M Greger Decl in Support of Motion to Intervene, #4 Attachments N-T Greger Decl in Support of Motion to Intervene, #5 Attachments U-AA Greger Decl in Support of Motion to Intervene) (Brandt, Peter) (Entered: 01/27/2009)
01/27/2009	48	EXHIBIT 5 Declaration of Russ Mead re 46 MOTION to INTERVENE filed by Animal Legal Defense Fund, Humane Farming Association, Farm Sanctuary Inc., Humane Society of the United States. (Attachments: #1 Attachments A-B Mead Declaration in Support of Motion to Intervene) (Brandt, Peter) (Entered: 01/27/2009)
01/28/2009	53	OPPOSITION by Edmund G. Brown. (Attachments: #1 Declaration Susan K. Leach) (Leach, Susan) (Entered: 01/28/2009)
02/04/2009	61	REPLY/RESPONSE to Defendants and Proposed Intervenor-Defendants'

		Responses to Plaintiff's Motion for Preliminary Injunction by National Meat Association re 46 MOTION to INTERVENE, 53 Opposition to Motion. (Attachments: #1 Declaration (Supplemental) of Barbara Masters, #2 Exhibit to Supplemental Declaration of Barbara Masters) (McCann, Heather) (Entered: 02/04/2009)
02/19/2009	71	FINDINGS of FACT and CONCLUSIONS of LAW on the Motion for Preliminary Injunction; Preliminary Injunction Order, signed by District Judge Lawrence J. O'Neill on 2/19/2009. (Kusamura, W) (Entered: 02/19/2009)
03/05/2009	75	NOTICE of APPEAL by Edmund G. Brown, Arnold Schwarzenegger, State of California. (Attachments: #1 Statement Representation, #2 Civil Appeals Docketing Statement) (Leach, Susan) (Entered: 03/05/2009)
03/06/2009	76	NOTICE of APPEAL by Humane Society of the United States, Farm Sanctuary Inc., Human Farming Association, Animal Legal Defense Fund as to 71 Findings of Fact & Conclusions of Law, Terminate Motions – O. (Attachments: #1 Statement Representation, #2 Civil Appeals Docketing Statement, #3 Certificate of Service) (Conant, Sarah) (Entered: 03/06/2009)

U.S. Court of Appeals
for the Ninth Circuit
Civil Docket for
Case Nos. 09-15483 and 09-15486

Brown, et al. v. National Meat Association

Date Filed	#	Docket Text
04/03/2009	9	Submitted (ECF) Opening brief for review. Submitted by Appellants Edmund G. Brown, Arnold Schwarzenegger and State of California in 09-15483. Date of service: 04/03/2009. [6871145] [09-15483, 09-15486] (SKS)
04/06/2009	10	Submitted (ECF) Opening brief for review. Submitted by Appellants ALDF, Farm Sanctuary, Inc., Humane Farming Association and The Humane Society of the United States in 09-15486. Date of service: 04/06/2009. [6871524] [09-15486, 09-15483] (SC)
05/01/2009	17	Submitted (ECF) Answering brief for review. Submitted by Appellee National Meat Association in 09-15483, 09-15486. Date of service: 05/01/2009. [6905475] [09-15483, 09-15486] (HMM)
05/15/2009	23	Submitted (ECF) Reply brief for review. Submitted by Appellants Edmund G. Brown, Arnold Schwarzenegger and State of California in 09-15483, -Edmund G. Brown, Arnold Schwarzenegger and State of California in 09-15486. Date of service:

		05/15/2009. [6922993] [09-15483, 09-15486] (SKS)
05/21/2009	26	Submitted (ECF) Reply brief for review. Submitted by Appellants ALDF, Farm Sanctuary, Inc., Humane Farming Association and The Humane Society of the United States in 09-15486. Date of service: 05/21/2009. [6928893] [09-15486, 09-15483] (SC)
03/31/2010	33	FILED OPINION (ALEX KOZINSKI, STEPHEN R. REINHARDT and BARRY G. SILVERMAN) VACATED. No costs. Judge: AK Authoring, FILED AND ENTERED JUDGMENT. [7284170] [09-15483, 09-15486] (RP)
04/21/2010	37	Filed (ECF) Appellee National Meat Association in 09-15483 petition for panel rehearing and petition for rehearing en banc (from 03/31/2010 opinion). Date of service: 04/21/2010. [7310559] [09-15483, 09-15486] – [COURT UPDATE: Backdated to original filing date. 04/22/2010 by RY] (HMM)
05/18/2010	38	Filed order (ALEX KOZINSKI, STEPHEN R. REINHARDT and BARRY G. SILVERMAN). The petition for rehearing and rehearing en banc is denied. See Fed. R. App. P. 35, 40. [7340312] [09-15483, 09-15486] (KKW)
05/20/2010	39	Filed (ECF) Appellee National Meat Association in 09-15486 Motion to stay the mandate. Date of service:

05/20/2010. [7344182] [09-15483, 09-15486] (HMM)

05/24/2010 40 Filed (ECF) – ALDF, Farm Sanctuary, Inc., Humane Farming Association and The Humane Society of the United States in 09-15483, Appellants ALDF, Farm Sanctuary, Inc., Humane Farming Association and The Humane Society of the United States in 09-15486 response opposing motion (motion to stay the mandate). Date of service: 05/24/2010. [7347588] [09-15483, 09-15486] (SC)

05/25/2010 41 Filed order (ALEX KOZINSKI) Plaintiff-Appellee's motion to stay the mandate pending the filing of a timely petition for certiorari is granted. See Fed. R. App. P. 41(d)(2). [7348941] [09-15483, 09-15486] (KKW)

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

NATIONAL MEAT ASSOCIATION, a not-for-profit corporation, Plaintiff,	CASE NO: _____ **DECLARATION OF BARBARA MASTERS IN SUPPORT OF**

v.

EDMUND GERALD BROWN, in his official capacity as Attorney General of California, ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California, and the STATE OF CALIFORNIA,

Defendants.

PLAINTIFF NATIONAL MEAT ASSOCIATION'S MOTION FOR PRELIMINARY INJUNCTION

(Filed Dec. 23, 2008)

Date:
Time:
Dept.:

DECLARATION OF BARBARA MASTERS

I, Barbara Masters, declare as follows:

1. I am a Veterinarian and Senior Policy Advisor with Olsson, Frank, Weeda, Terman, Bode and Matz with eighteen years prior experience working for the Food Safety and Inspection Service ("FSIS"), including serving in the capacity as the FSIS Administrator for three years. In my previous and current positions, I was and am responsible for providing guidance to the meat industry to ensure compliance with the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601 *et seq*. In particular, while at FSIS, I was responsible for enforcing the FMIA and the implementing regulations. I assisted in developing training material and Directives (instructions for in-plant employees) to follow on making livestock dispositions at the slaughterhouses. I have personal knowledge of the following facts or knowledge of such facts based upon review of relevant public records or business

documents. If called as a witness, I could competently testify thereto.

2. The FMIA and its implementing regulations, as well as the FSIS Directives, prescribe observations to be made during ante-mortem inspection procedures to ensure the observation of specific diseases unique to individual species of livestock. For example, clinical symptoms observed in swine due to erysipelas or hog cholera would not be observed in bovine or ovine species. Swine with erysipelas may show signs of a fever or more "classic" symptoms of "diamond-shaped" wheals on their skin. Swine that show symptoms of erysipelas are considered as "U.S. Suspects" under 9 C.F.R. § 309.2(h) and (i). Hog cholera causes high fever and discoloration of the skin. All swine identified as having hog cholera are condemned under 9 CFR § 309.5.

3. Other clinical symptoms may present in the multiple species, but the underlying disease condition may be different for the individual species, and therefore FSIS disposition will differ for the individual species, depending on the risk to public health. Examples of species' common disease conditions include arthritis, neoplasms, and mastitis, and the disposition is based on the overall health status of the individual animal, and the specific causative agent of the underlying condition.

4. Similarly, the FSIS policy to condemn all nonambulatory cattle [9 CFR § 309.2(e)] is targeted specifically to cattle in order to minimize the risk of

bovine spongiform encephalopathy ("BSE"). BSE, also known as "mad cow disease," is a progressive neurological disorder of cattle that is spread from feeding BSE-infected proteins from ruminants to other ruminants. BSE is not transmitted by ruminant-to-ruminant contact like typical bacterial or viral diseases.

5. No case of naturally-acquired BSE has ever been demonstrated in pigs. As a result, there is no determinable risk that a "nonambulatory" hog, as defined by California Penal Code § 599f, has become unable to stand or walk without assistance as a result of BSE. Nor, for that matter, is there any ascertainable risk that the slaughter and processing of "nonambulatory" swine could result in BSE-infected swine meat entering the food supply for human consumption.

6. Although the FMIA and its implementing regulations and directives treat different species of livestock differently for inspection purposes, as well as different disease conditions for disposition purposes, California Penal Code § 599f does not distinguish between the species, or account or make exception for the fact that different animal species are affected by different diseases that may or may not pose a human health risk. Instead, California Penal Code § 599f requires that all nonambulatory animals be euthanized and excluded from the food supply for human consumption.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 23 day of December, 2008, at Washington, District of Columbia.

/s/ Barbara Masters (original signature retained by attorney Tim Droske)

BARBARA MASTERS

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Attorneys for Plaintiff
NATIONAL MEAT ASSOCIATION

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

NATIONAL MEAT ASSOCIATION, a not-for-profit corporation, Plaintiff,	CASE NO: _____ **DECLARATION OF MICHAEL TERRILL IN SUPPORT OF**

v.

EDMUND GERALD BROWN, in his official capacity as Attorney General of California, ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California, and the STATE OF CALIFORNIA,

Defendants.

PLAINTIFF NATIONAL MEAT ASSOCIATION'S MOTION FOR PRELIMINARY INJUNCTION

(Filed Dec. 23, 2008)

Date:
Time:
Dept.:

DECLARATION OF MICHAEL TERRILL

I, Michael Terrill, declare as follows:

1. I am a Vice President – Procurement and Meat Quality with Clougherty Packing, LLC ("Clougherty Packing"). Clougherty Packing is a member of the National Meat Association, the named Plaintiff in this suit. In my position, I am responsible for livestock procurement. The livestock procurement function includes the receiving, handling and movement of hogs through the process prior to slaughter. I have personal knowledge of the following facts or knowledge of such facts based upon review of relevant business records and documents. If called as a witness, I could competently testify thereto.

2. Clougherty Packing is a subsidiary of Hormel Foods Corporation ("Hormel") and sells its products under the trade name "Farmer John."

3. Clougherty operates a federally-inspected slaughterhouse located in Vernon, California that purchases and processes swine and distributes swine products in interstate commerce. Approximately 210-225 truckloads of hogs arrive each week. Hog deliveries are usually made to the slaughterhouse each night, six nights per week. Approximately 7,700 hogs are processed per day.

4. Approximately 93% of all hogs delivered to this slaughterhouse are transported in interstate commerce. Approximately 65% of hogs transported in interstate commerce are delivered from Arizona and Utah and 22% are delivered from Colorado, Nebraska and Texas.

5. Approximately .5% of hogs delivered to Farmer John may become stressed or fatigued in transit and therefore cannot stand or walk upon arrival. Many of these hogs are capable of standing up, but may prefer to lie down during and after transportation, and refuse to stand or walk upon arrival. Those hogs are put on a plastic sled, placed in a hospital pen, and inspected by the FSIS for disease. An FSIS inspector makes a determination, with respect to each downed hog, as to whether that hog is fit for slaughter. Although these hogs cannot stand or walk when they arrive, most of the hogs are merely fatigued or stubborn and are able to stand and walk after rest and supervision. The hogs routinely pass federal inspection and are put into the food supply.

6. California Penal Code § 599f, as amended, places myself and other employees in danger of criminal prosecution and significant fines for receiving and processing hogs that cannot or will not stand or walk upon arrival.

7. Thus, in order to avoid prosecution, Farmer John would be forced to turn away fatigued hogs that are only temporarily unable to stand or walk. Those hogs could not be set aside and inspected by the FSIS or cleared for processing, as permitted under federal law.

8. Sometimes hogs that are able to stand and walk when they arrive become unable or unwilling to do so after being removed from the truck and placed in a holding pen. Any number of factors can contribute to the pig's inability or unwillingness to stand or walk, including heat and fatigue or stress from transit.

9. Approximately 225 pigs per day are temporarily unable to stand or walk while awaiting slaughter. A federal inspector clears each lot of pigs held by the slaughterhouse before the slaughter and has approved Farmer John's process for handling such pigs. Any hog that becomes unable to stand or walk while awaiting the slaughter is stunned in the pen, and assisted to the front of the line for slaughter. Under federal law, these hogs may still be placed in the slaughter for human consumption.

10. It is my understanding that Amended Section 599f would require the slaughterhouse to immediately euthanize any hog that becomes

nonambulatory while in the holding pen or being led to slaughter, and that the hog must be removed from the food supply.

11. In addition to the pre-slaughter inspections, federal inspectors also inspect the hog carcasses post-mortem, or after the slaughter. Federal inspectors remove from the food supply any meat that does not satisfy federal standards.

12. The impact on Farmer John of compliance with Amended Section 599f would be significant. As an example, Farmer John would be required to remove from slaughter and the food supply approximately 225 hogs per day that are temporarily unable or unwilling to stand or walk. At a value of $125 per hog and 252 days of harvest, the total monetary impact on Farmer John is approximately $7,087,500 per year. In addition, in order accommodate and render these additional hogs on a daily basis, Farmer John would have to either expand its existing rendering facilities or incur costs to send the hogs to an outside vendor.

13. Finally, if Farmer John does not comply with the Amended Statute, its employees could face criminal sanctions, including imprisonment for up to one year and fines of up to $20,000 per occurrence. These sanctions expose Farmer John employees to criminal penalties and fines, even though[ ] these workers have been trained to comply and are complying with federal law.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 22 day of December, 2008, at Snowflake, Arizona.

/s/ Michael Terrill (original signature retained by attorney Tim Droske)

MICHAEL TERRILL

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

NATIONAL MEAT ASSOCIATION, a not-for-profit corporation, Plaintiff, **v.** **EDMUND GERALD BROWN, in his official capacity as Attorney General of**	CASE NO.: 1:08-cv-01963-LJO-DLB **DECLARATION OF SUSAN K. LEACH IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** (Filed Jan. 28, 2009) Hearing: February 11, 2009

California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; and the STATE OF CALIFORNIA, Defendant.	Time: 8:00 a.m. Courtroom: 4 Judge: Before the Honorable Lawrence J. O'Neill

I, SUSAN K. LEACH, declare as follows:

1. I am an attorney admitted to practice before the Courts of the State of California and this Court. I am a Deputy Attorney General in the Government Law Section of the Office of the Attorney General, and I am one of the attorneys of record in this matter for defendants Attorney General Edmund G. Brown Jr., Governor Arnold Schwarzenegger and the State of California. The matters set forth in this Declaration are true of my own knowledge, and if called as a witness I could and would testify competently thereto.

2. Attached hereto as Exhibit A is a true and correct copy of the legislative history of California Penal Code § 599f.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is

true and correct and that this declaration is executed this 28th day of January, 2009, in Los Angeles, California.

/s/ Susan K. Leach
SUSAN K. LEACH

EXHIBIT "A"

[LOGO] **Bill Documents**

I want to search again.

Documents associated with AB 2098 in the 2007-2008 Session

Status – 08/05/2008 1344 bytes
History – 07/22/2008 2476 bytes

Bill Text

In order to view the PDF version of the bill text documents, you may need a free viewer from Adobe.

Chaptered – 07/22/2008
HTML – 5798 bytes PDF – 73217 bytes
Enrolled – 07/07/2008
HTML – 5699 bytes PDF – 78511 bytes
Amended – 04/23/2008
HTML – 6328 bytes PDF – 149247 bytes
Amended – 04/09/2008
HTML – 5528 bytes PDF – 148897 bytes
Amended – 03/25/2008
HTML – 5935 bytes PDF – 148769 bytes
Introduced – 02/19/2008
HTML – 4466 bytes PDF – 145986 bytes

Analyses

Senate Floor – 07/01/2008 – 12420 bytes
Senate Floor – 06/30/2008 – 12180 bytes
Senate Committee – 06/16/2008 – 26769 bytes

Assembly Floor – 04/25/2008 – 9835 bytes
Assembly Committee – 04/15/2008 – 6089 bytes
Assembly Committee – 03/28/2008 – 16879 bytes

Votes

Senate Floor – 07/02/2008 – 1129 bytes
Senate Committee – 06/17/2008 – 916 bytes
Assembly Floor – 05/15/2008 – 1401 bytes
Assembly Committee – 04/16/2008 – 978 bytes
Assembly Committee – 04/01/2008 – 958 bytes

CURRENT BILL STATUS

MEASURE : A.B. No. 2098
AUTHOR(S) : Krekorian (Coauthors: Huffman, Leno, and Portantino) (Coauthor: Senator Romero).
TOPIC : Animals: nonambulatory: cruelty.
+LAST AMENDED DATE : 04/23/2008

TYPE OF BILL :

Inactive
Non-Urgency
Non-Appropriations
Majority Vote Required
State-Mandated Local Program
Fiscal
Non-Tax Levy

LAST HIST. ACT. DATE : 07/22/2008
LAST HIST. ACTION : Chaptered by Secretary of State – Chapter 194, Statutes of 2008.
COMM. LOCATION : SEN APPROPRIATIONS
COMM. ACTION DATE : 06/30/2008
COMM. ACTION : Senate Rule 28.8.

TITLE : An act to amend Section 599f of the Penal Code, relating to animals.

COMPLETE BILL HISTORY

BILL NUMBER : A.B. No. 2098
AUTHOR : Krekorian
TOPIC : Animals: nonambulatory: cruelty.

TYPE OF BILL :

Inactive
Non-Urgency
Non-Appropriations
Majority Vote Required
State-Mandated Local Program
Fiscal
Non-Tax Levy

BILL HISTORY

2008

July 22	Chaptered by Secretary of State – Chapter 194, Statutes of 2008.
July 22	Approved by the Governor.
July 10	Enrolled and to the Governor at 10 a.m.
July 3	In Assembly. To enrollment.
July 2	Read third time, passed, and to Assembly. (Ayes 31. Noes 4. Page 4613.)
July 1	Read second time. To third reading.
June 30	From committee: Be placed on second reading file pursuant to Senate Rule 28.8.
June 17	From committee: Do pass, and re-refer to Com. on APPR. Re-referred. (Ayes 4. Noes 0.) .
May 22	Referred to Com. on PUB. S.
May 15	In Senate. Read first time. To Com. on RLS. for assignment.
May 15	Read third time, passed, and to Senate. (Ayes 75. Noes 0. Page 5132.)

Apr. 24	Read second time. To third reading.
Apr. 23	Read second time and amended. Ordered returned to second reading.
Apr. 22	From committee: Amend, and do pass as amended. (Ayes 14. Noes 1.) (April 16).
Apr. 10	Re-referred to Com. on APPR.
Apr. 9	Read second time and amended.
Apr. 8	From committee: Amend, do pass as amended, and re-refer to Com. on APPR. (Ayes 6. Noes 1.) (April 1).
Mar. 28	Re-referred to Com. on PUB. S.
Mar. 25	In committee: Set, first hearing. Hearing canceled at the request of author. From committee chair, with author's amendments: Amend, and re-refer to Com. on PUB. S. Read second time and amended.
Feb. 28	Referred to Com. on PUB. S.
Feb. 20	From printer. May be heard in committee March 21.
Feb. 19	Read first time. To print.

West's

ANNOTATED

CALIFORNIA CODES

PENAL CODE

Sections 594 to 680

Volume 49

2009
Cumulative Pocket Part

Replacing 2008 Pocket Part
supplementing 1999 main volume.
Pocket Part will be supplemented by
Interim Update Service Pamphlets
No. 1 and No. 2 in 2009.

Includes all laws through the 2008 portion of the 2007-2008 Regular Session, the 2007-2008 First, Second, and Third Extraordinary Sessions, and propositions voted on at the Feb. 5, June 3, and Nov. 4, 2008 elections

THOMSON
WEST

* * *

§ 599f. Nonambulatory animals; slaughter houses, stockyards, auctions, market agencies, or dealers; transactions; processing; euthanasia; movement; violations

(a) No slaughterhouse * * * , stockyard, * * * auction, market agency, or dealer shall buy, sell, or receive a nonambulatory animal.

(b) No slaughterhouse shall process, butcher, or sell meat or products of nonambulatory animals for human consumption.

(c) No slaughterhouse * * * shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal * * * .

(d) No stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

(e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

(f) No person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

(g) No person shall accept a nonambulatory animal for transport or delivery to a slaughterhouse, stockyard, auction, market agency, or dealer.

(h) A violation of this section is subject to * * * imprisonment in the county jail for a period not to exceed one year, or by a fine of not more than twenty thousand dollars ($20,000), or both that fine and imprisonment.

(i) As used in this section, "nonambulatory" mans unable to stand and walk without assistance.

(j) As used in this section, "animal" means live cattle, swine, sheep, or goats.

(k) As used in this section, "humanely euthanized" means to kill by a mechanical, chemical, or electrical method that rapidly and effectively renders the animal insensitive to pain.

Additions or changes indicated by underline; deletions by asterisks * * * .

(Added by Stats.1994, c. 600 (S.B.692), § 1. Amended by Stats.2008, c. 194 (A.B.2098), § 1.)

Historical and Statutory Notes

2008 Legislation

Stats.2008, c. 194 (A.B.2098), rewrote this section, which had read:

"(a) No slaughterhouse that is not inspected by the United States Department of Agriculture,

stockyard, or auction shall buy, sell, or receive a nonambulatory animal.

"(b) No slaughterhouse, stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises.

"(c) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

"(d) A violation of this section is a misdemeanor.

"(e) As used in this section, 'nonambulatory' means unable to stand and walk without assistance.

"(f) As used in this section, 'animal' means live cattle, swine, sheep, or goats.

"(g) As used in this section, 'humanely euthanized' means to kill by a mechanical, chemical, or electrical method that rapidly and effectively renders the animal insensitive to pain."

Section 2 of Stats.2008, c. 194 (A.B.2098), provides:

"SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district

will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution."

Research References

Encyclopedias

Other Specific Misdemeanor Offenses Involving Cruelty to Animals, Cal. Jur. 3d Criminal Law: Crimes Against Property § 493.

Treatises and Practice Aids

2 Witkin Cal. Crim. L. 3d Crimes Against Property § 270, (S 270) Miscellaneous.

* * *

VERSION OF THE BILL
FROM INTRODUCTION TO CHAPTER

* * *

CALIFORNIA LEGISLATURE – 2007-08 REGULAR SESSION.

ASSEMBLY BILL **No. 2098**

Introduced by Assembly Member Krekorian

February 19, 2008

An act to amend Section 599f of the Penal Code, relating to animals.

LEGISLATIVE COUNSEL'S DIGEST

AB 2098, as introduced, Krekorian. Animals: nonambulatory: cruelty.

Existing law prohibits a nonfederally inspected slaughterhouse, stockyard, or auction from buying, selling, or receiving nonambulatory animals, as defined.

This bill would also prohibit a slaughterhouse, stockyard, or auction from selling meat or products of nonambulatory animals for consumption.

Existing law also prohibits a slaughterhouse, stockyard, auction, market agency, or dealer from holding a nonambulatory animal without taking immediate action to humanely euthanize the animal

or remove the animal from the premises. Existing law makes a violation of those provisions a misdemeanor.

This bill would instead require one of the above entities, in the circumstances described, to either take immediate action to humanely euthanize the animal or humanely remove the animal for veterinary treatment. By changing the definition of a crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 599f of the Penal Code is amended to read:

599f. (a) No slaughterhouse that is not inspected by the United States Department of Agriculture, stockyard, or auction shall buy, sell, or receive a nonambulatory animal.

(b) No slaughterhouse, stockyard, or auction shall sell meat or products of nonambulatory animals for consumption.

~~(b)~~

(c) No slaughterhouse, stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal, or *humanely* remove the animal ~~from the premises~~ *for veterinary treatment*.

~~(c)~~

(d) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

~~(d)~~

(e) violation of this section is a misdemeanor.

~~(e)~~

(f) As used in this section, "nonambulatory" means unable to stand and walk without assistance.

~~(f)~~

(g) As used in this section, "animal" means live cattle, swine, sheep, or goats.

~~(g)~~

(h) As used in this section, "humanely euthanized" means to kill by a mechanical, chemical, or electrical method that rapidly and effectively renders the animal insensitive to pain.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

AMENDED IN ASSEMBLY MARCH 25, 2008

CALIFORNIA LEGISLATURE – 2007-08 REGULAR SESSION.

ASSEMBLY BILL **No. 2098**

Introduced by Assembly Member Krekorian

February 19, 2008

An act to amend Section 599f of the Penal Code, relating to animals.

LEGISLATIVE COUNSEL'S DIGEST

AB 2098, as amended, Krekorian. Animals: nonambulatory: cruelty.

Existing law prohibits a nonfederally inspected slaughterhouse, stockyard, or auction from buying, selling, or receiving nonambulatory animals, as defined.

This bill would ~~also prohibit a slaughterhouse, stockyard, or auction from selling meat or products of~~ *instead prohibit a slaughterhouse from processing or butchering, or selling meat or products of,* nonambulatory animals for *human* consumption.

Existing law also prohibits a slaughterhouse, stockyard, auction, market agency, or dealer from holding a nonambulatory animal without taking immediate action to humanely euthanize the animal

or remove the animal from the premises. Existing law makes a violation of those provisions a misdemeanor.

This bill would ~~instead require one of the above entities, in the circumstances described, to either take immediate action to humanely euthanize the animal or humanely remove the animal for~~ *revise and recast those provisions. It would prohibit a slaughterhouse from holding a nonambulatory animal without taking immediate action to humanely euthanize the animal. It would also require a stockyard, auction, market agency, or dealer, holding a nonambulatory animal, to take immediate action to either humanely euthanize the animal or provide immediate* veterinary treatment. *The bill would also increase the penalties for these crimes, making them punishable as either a misdemeanor or a felony, as specified.* By changing the ~~definition~~ *scope* of ~~a crime~~ *crimes*, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 599f of the Penal Code is amended to read:

599f. (a) No slaughterhouse ~~that is not inspected by the United States Department of Agriculture, stockyard, or auction shall buy, sell, or receive a nonambulatory animal~~, *shall process or butcher a nonambulatory animal for human consumption.*

(b) No Slaughterhouse, ~~stockyard, or auction~~ shall sell meat or products of nonambulatory animals for *human* consumption.

(c) No slaughterhouse, ~~stockyard, auction, market agency, or dealer~~ shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal~~, or humanely remove the animal for veterinary treatment~~.

(d) No stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

~~(d)~~

(e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

~~(e)~~

(f) A violation of this section is ~~a misdemeanor~~ *subject to imprisonment in the state prison, or by a fine of not more than twenty thousand dollars ($20,000); or by both that fine and imprisonment, or alternatively, by imprisonment in a county jail for not more than one year, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and, imprisonment.*

~~(f)~~

(g) As used in this section, "nonambulatory" means unable to stand and walk without assistance.

~~(g)~~

(h) As used in this section, "animal" means live cattle, swine, sheep, or goats.

~~(h)~~

(i) As used in this section, "humanely euthanized" means to kill by a mechanical, chemical, or electrical method that rapidly and effectively renders the animal insensitive to pain.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government

Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

AMENDED IN ASSEMBLY APRIL 23, 2008

AMENDED IN ASSEMBLY APRIL 9, 2008

AMENDED IN ASSEMBLY MARCH 25, 2008

CALIFORNIA LEGISLATURE – 2007-08 REGULAR SESSION

ASSEMBLY BILL **No. 2098**

Introduced by Assembly Member Krekorian
(Coauthors: Assembly Members Huffman, *Leno*, and Portantino)
(Coauthor: Senator Romero)

February 19, 2008

An act to amend Section 599f of the Penal Code, relating to animals.

LEGISLATIVE COUNSEL'S DIGEST

AB 2098, as amended, Krekorian. Animals: nonambulatory: cruelty.

Existing law prohibits a nonfederally inspected slaughterhouse, stockyard, or auction from buying, selling, or receiving nonambulatory animals, as defined.

This bill would instead prohibit ~~a slaughterhouse from processing or butchering, or selling meat or products of, nonambulatory animals for human consumption~~ *a slaughterhouse, stockyard, auction, market agency, or dealer from buying, selling, or*

receiving a nonambulatory animal. It would also prohibit a slaughterhouse from processing, butchering, or selling meat or products of nonambulatory animals for human consumption.

Existing law also prohibits a slaughterhouse, stockyard, auction, market agency, or dealer from holding a nonambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises. Existing law makes a violation of those provisions a misdemeanor.

This bill would revise and recast those provisions. It would prohibit a slaughterhouse from holding a nonambulatory animal without taking immediate action to humanely euthanize the animal. It would also require a stockyard, auction, market agency, or dealer, holding a nonambulatory animal, to take immediate action to either humanely euthanize the animal or provide immediate veterinary treatment. *This bill would also prohibit a person from selling, consigning, or shipping a nonambulatory animal, or receiving such an animal for transport or delivery, to a slaughterhouse, stockyard, auction, market agency, or dealer.* The bill would ~~also increase the penalties for these crimes, making them~~ *make these crimes* punishable by imprisonment in a county jail for a period not to exceed one year, by a $20,000 fine, or by both that fine and imprisonment, as specified. By changing the scope of crimes, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse ideal agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 599f of the Penal Code is amended to read:

599f. (a) No ~~slaughterhouse shall process or butcher a nonambulatory animal for human consumption~~ *slaughterhouse, stockyard, auction, market agency, or dealer shall buy, sell, or receive a nonambulatory animal.*

(b) No slaughterhouse shall *process, butcher, or* sell meat or products of nonambulatory animals for human consumption.

(c) No slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.

(d) No stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

(e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

(f) No person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

(g) No person shall accept a nonambulatory animal for transport or delivery to a slaughterhouse, stockyard auction, market agency, or dealer.

~~(f)~~

(h) A violation of this section is subject to imprisonment in the county jail for a period not to exceed one year, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and imprisonment.

~~(g)~~

(i) As used in this section, "nonambulatory" means unable to stand and walk without assistance.

~~(h)~~

(j) As used in this section, "animal" means live cattle, swine, sheep, or goats.

~~(i)~~

(k) As used in this section, "humanely euthanized" means to kill by a mechanical, chemical, or electrical method that rapidly and effectively renders the animal insensitive to pain.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Assembly Bill No. 2098

Passed the Assembly May 15, 2008

Chief Clerk of the Assembly

Passed the Senate July 2, 2008

Secretary of the Senate

This bill was received by the Governor this ___ day of _____, 2008, at ___ o'clock ___M.

Private Secretary of the Governor

CHAPTER ___

An act to amend Section 599f of the Penal Code, relating to animals.

LEGISLATIVE COUNSEL'S DIGEST

AB 2098, Krekorian. Animals: nonambulatory: cruelty.

Existing law prohibits a nonfederally inspected slaughterhouse, stockyard, or auction from buying, selling, or receiving nonambulatory animals, as defined.

This bill would instead prohibit a slaughterhouse, stockyard, auction, market agency, or dealer from buying, selling, or receiving a nonambulatory animal. It would also prohibit a slaughterhouse from processing, butchering, or selling meat or products of nonambulatory animals for human consumption.

Existing law also prohibits a slaughterhouse, stockyard, auction, market agency, or dealer from holding a nonambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises. Existing law makes a violation of those provisions a misdemeanor.

This bill would revise and recast those provisions. It would prohibit a slaughterhouse from holding a nonambulatory animal without taking immediate action to humanely euthanize the animal. It would also require a stockyard, auction, market agency, or dealer, holding a nonambulatory animal, to take immediate action to either humanely euthanize the animal or provide immediate veterinary treatment. This bill would also prohibit a person from selling, consigning, or shipping a nonambulatory animal, or receiving such an animal for transport or delivery, to a slaughterhouse, stockyard, auction, market agency, or dealer. The bill would make these crimes punishable by imprisonment in a county jail for a period not to exceed one year, by a $20,000 fine, or by both that fine and imprisonment, as specified. By changing the scope of crimes, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 599f of the Penal Code is amended to read:

599f. (a) No slaughterhouse, stockyard, auction, market agency, or dealer shall buy, sell, or receive a nonambulatory animal.

(b) No slaughterhouse shall process, butcher, or sell meat or products of nonambulatory animals for human consumption.

(c) No slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.

(d) No stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

(e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at

any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

(f) No person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

(g) No person shall accept a nonambulatory animal for transport or delivery to a slaughterhouse, stockyard, auction, market agency, or dealer.

(h) A violation of this section is subject to imprisonment in the county jail for a period not to exceed one year, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and imprisonment.

(i) As used in this section, "nonambulatory" means unable to stand and walk without assistance.

(j) As used in this section, "animal" means live cattle, swine, sheep, or goats.

(k) As used in this section, "humanely euthanized" means to kill by a mechanical, chemical, or electrical method that rapidly and effectively renders the animal insensitive to pain.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or

changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Assembly Bill No. 2098

CHAPTER 194

An act to amend Section 599f of the Penal Code, relating to animals.

[Approved by Governor July 22, 2008.
Filed with Secretary of State July 22, 2008.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2098, Krekorian. Animals: nonambulatory: cruelty.

Existing law prohibits a nonfederally inspected slaughterhouse, stockyard, or auction from buying, selling, or receiving nonambulatory animals, as defined.

This bill would instead prohibit a slaughterhouse, stockyard, auction, market agency, or dealer from buying, selling, or receiving a nonambulatory animal. It would also prohibit a slaughterhouse from processing, butchering, or selling meat or products of nonambulatory animals for human consumption.

Existing law also prohibits a slaughterhouse, stockyard, auction, market agency, or dealer from holding a nonambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises. Existing law makes a violation of those provisions a misdemeanor.

This bill would revise and recast those provisions. It would prohibit a slaughterhouse from holding a nonambulatory animal without taking

immediate action to humanely euthanize the animal. It would also require a stockyard, auction, market agency, or dealer, holding a nonambulatory animal, to take immediate action to either humanely euthanize the animal or provide immediate veterinary treatment. This bill would also prohibit a person from selling, consigning, or shipping a nonambulatory animal, or receiving such an animal for transport or delivery, to a slaughterhouse, stockyard, auction, market agency, or dealer. The bill would make these crimes punishable by imprisonment in a county jail for a period not to exceed one year, by a $20,000 fine, or by both that fine and imprisonment, as specified. By changing the scope of crimes, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 599f of the Penal Code is amended to read:

599f. (a) No slaughterhouse, stockyard, auction, market agency, or dealer shall buy, sell, or receive a nonambulatory animal.

(b) No slaughterhouse shall process, butcher, or sell meat or products of nonambulatory animals for human consumption.

(c) No slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.

(d) No stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

(e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

(f) No person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

(g) No person shall accept a nonambulatory animal for transport or delivery to a slaughterhouse, stockyard, auction, market agency, or dealer.

(h) A violation of this section is subject to imprisonment in the county jail for a period not to exceed one year, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and imprisonment.

(i) As used in this section, "nonambulatory" means unable to stand and walk without assistance.

(j) As used in this section, "animal" means live cattle, swine, sheep, or goats.

(k) As used in this section, "humanely euthanized" means to kill by a mechanical, chemical, or electrical method that rapidly and effectively renders the animal insensitive to pain.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Date of Hearing: April 1, 2008
Counsel: Kathleen Ragan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Jose Solorio, Chair

AB 2098 (Krekorian) – As Amended: March 25, 2008
As Proposed to be Amended

SUMMARY : Provides that no slaughterhouse shall process or butcher a non-ambulatory animal for human consumption. Specifically, this bill :

1) Prohibits any slaughterhouse from holding a non-ambulatory animal without taking immediate action to humanely euthanize the animal, and further prohibits any stockyard, auction, market agency, or dealer from holding a non-ambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

2) Provides that a violation of these provisions is punishable by imprisonment in a county jail for a period not exceeding one year; by a fine of not more than $20,000; or by both that fine and imprisonment.

EXISTING LAW :

1) Provides that no slaughterhouse that is not inspected by the United States Department of Agriculture (USDA), stockyard, or auction shall buy, sell, or receive a non-ambulatory animal. (Penal Code section 599f(a).)

2) States that no slaughterhouse, stockyard, auction, market agency or dealer shall hold a non-ambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises. (Penal Code section 599f(b).)

3) States that while in transit or on the premises of a stockyard, auction, market agency, dealer or slaughterhouse, a non-ambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance. (Penal Code section 599f(c).)

4) Provides that a violation of this section is a misdemeanor. (Penal Code section 599f(d).)

5) States that except in cases where a different punishment is prescribed by law, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months; by a fine not exceeding $1,000; or both. (Penal Code section 19.)

6) Defines "non-ambulatory" as unable to stand and walk without assistance. (Penal Code section 599f(e).)

7) Defines "animal" as live cattle, swine, sheep, or goats. (Penal Code section 599f(f).)

8) States that as used in this section, "humanely euthanized" means to kill by a mechanical, chemical or electrical method that rapidly and effectively renders the animal insensitive to pain. (Penal Code section 599f(g).)

9) Provides except as otherwise provided, every person who maliciously and intentionally maims, mutilates, tortures or wounds a living animal, or maliciously and intentionally kills an animal, is guilty of an offense punishable in the state prison, or by a fine of not more than $20,000, or both the fine and imprisonment; or, alternatively, by imprisonment in a county jail for not more than one year, or by a fine of not more than $20,000 or by both the fine and imprisonment. (Penal Code section 597(a).)

10) States that any person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink or shelter, any animal, and whoever, having the charge or custody of the animal either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses the animal or uses the animal when unfit for labor is, for every such offense, guilty of a crime punishable as a misdemeanor or felony or alternatively punishable as a misdemeanor or felony and by a fine of not more than $20,000. (Penal Code section 597(b).).

FISCAL EFFECT : Unknown

COMMENTS :

1) Author's Statement : According to the author, "On January 30, 2008, the Humane Society of the United States released video documentation of the horrific abuse of downed cattle at a California meat packing company. "Downed" cattle are defines [sic] as being too diseased and/or disabled to

stand or walk without assistance. Images of workers repeatedly kicking, electrocuting, ramming with forklifts and even spraying water down the noses of the animals sent shockwaves throughout the nation.

"It was soon revealed that nearly 37 million pounds of the contaminated beef ended up in both California's and the nation's school lunch programs. Public health professionals have long warned that meat derived from downed animals has a much increased susceptibility to passing on the E. coli virus, mad cow disease, and salmonella – all of which can lead to severe human health complications and even death.

"These revelations set off the largest beef recall (143 million pounds) in U.S. history due to the risks posed by this meat that has been deemed by the USDA as unfit for consumption. Unfortunately, much of this condemned beef has already been consumed by our nation's school children and the public at large. Worse still, due to the well-documented failings of the USDA inspection system, there is still no adequate system in place to prevent downed animals from continuing to enter our food supply. That is largely due to the fact that California law does not specifically prohibit the processing and sale of meat from non-ambulatory animals for human consumption, thus limiting the state's ability to prevent this occurrence.

"Current law does not prohibit the purchasing, slaughter, and sale of non-ambulatory animals for consumption. This bill will amend the Penal

Code to include this vitally important safeguard. AB 2098 strengthens California's ability to protect animals, people, and our food supply by specifically prohibiting slaughterhouses or other entities from processing and selling meat from non-ambulatory animals for human consumption."

2) Background : According to an article in USA Today (Schmidt, Cattle Abuse was not a Rare Occurrence, USA Today), "The abuse of non-ambulatory animals at a California slaughterhouse has renewed calls for a ban on the slaughter of such animals, and newly released government records show such mishandling in past years was more than a rare occurrence. More than 10% of the humane-slaughter violations issued by the United States Department of Agriculture for the 18 months ending March 2004 detailed improper treatment of animals that could not walk – mostly cattle, says the Animal Welfare Institute, an animal protection group.

"The finding, drawn from USDA records the institute recently received in response to a Freedom of Information Act request, is included in a report to be released on humane-slaughter violations. It comes as the USDA steps up checks on conditions at the nation's 900 slaughterhouses following abuses at Westland/Hallmark Meat, now at the heart of the biggest beef recall ever."

[Although an American meat institute spokeswoman called these violations an anomaly] "the USDA records describe 501 humane-handling or slaughter violations that occurred at other slaughter

plants. At one plant, a downed cow was pushed 15 feet with a forklift. Other companies were cited for dragging downed but conscious animals, letting downed cattle be trampled and stood on by others, and in one case, 'using excessive force with a rope, and an electric prod to get a downed cow to stand the enforcement records state."

3) Link Between Downed Cattle and Mad Cow Disease Established : According to an article posted on the United States Humane Society Web page, "As science has made clear, [prohibiting the use of downed cows] is necessary to protect food safety. The practice of slaughtering downed cows is especially troubling now that the link between downed cattle and bovine spongiform encephalopathy (BSE), also known as mad cow disease, has been firmly established. Of the 15 known cases of BSE-infected animals discovered in North America, at least 12 involved downed cows."

A letter posted on the Internet from a veterinarian, cites a presentation made at the 1996 annual meeting of the Livestock Conservation Institute at the University of California, Davis, by Dr. John Maas and Dr. C. Stull. Their study showed that 14% of the downed cows were Salmonella positive at the slaughter house. "One cow with Salmonella septicemia was passed by the Inspector and entered the food chain, exemplifying the difficulty of properly identifying animals with zoonotic pathogens by antemortem inspection.

"An emerging issue is the risk of prion diseases such as Bovine Spongiform Encephalitis (BSE) entering the human food chain. Downed cattle are

considered by many to be a risk group for having BSE. In fact, the surveillance of BSE in the U.S. is centered on testing tissues from downed cattle sent to slaughter. [I]n California only about 5% of the downed cattle are tested for BSE."

4) Arguments in Support : According to the Humane Society of the United States, "On behalf of the nation's largest animal protection organization backed by 10 million Americans, with over 1,200,000 members and constituents in California, the Humane Society of the United States (HSUS) is in support of AB 2098 and is pleased to be a co-sponsor of the bill. AB 2098 addresses the issue of 'downed' animals being processed at slaughterhouses for human consumption.

"Downed animals are defined as being too diseased and/or disabled to stand or walk without assistance. Current law in California requires that downed animals be immediately euthanized or humanely removed from the premises. California has limited ability in preventing meat that is classified as unfit for human consumption from passing to the general public. AB 2098 specifically states that 'No slaughterhouse, stockyard, or auction shall sell meat or products of non-ambulatory animals for consumption.'

"HSUS released a video in January of this year which depicted the inhumane treatment of downed animals at a California slaughterhouse. The video showed workers electrocuting, kicking, ramming with forklifts and spraying water into the nostrils of the disabled cows. As a result of the video and the subsequent investigation, 143 million pounds

of beef were recalled. However, 37 million pounds of the contaminated meat ended up in school lunch programs across the nation.

"Public health officials warn that downed cattle have increased susceptibility of passing on the E. coli virus, mad cow disease, and salmonella – all of which can lead to severe human health complications and even death.

"AB 2098 will better protect human health and the inhumane treatment of downed animals. California slaughterhouses, stockyards, auctions and market agencies will be prevented from buying, selling, or receiving non-ambulatory animals. HSUS thanks Assemblyman Paul Krekorian for authoring AB 2098."

REGISTERED SUPPORT/OPPOSITION :

Support

California District Attorneys Association
United States Humane Society

Opposition

None

Analysis Prepared by : Kathleen Ragan/PUB. S./ (916) 319-3744

Date of Hearing: April 16, 2008

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Mark Leno, Chair

AB 2098 (Krekorian) – As Amended: April 9, 2008

Policy Committee: Public
SafetyVote: 6-1

Urgency: No State Mandated Local Program: Yes
Reimbursable: No

SUMMARY

This bill states that no slaughterhouse may process or butcher a non-ambulatory animal for human consumption. Specifically, this bill:

1) Prohibits a slaughterhouse from holding a non-ambulatory animal without taking immediate action to humanely euthanize the animal, and prohibits any stockyard, auction, market agency, or dealer from holding a non-ambulatory animal without taking immediate action to humanely euthanize the animal or provide immediate veterinary treatment.

2) Makes a violation of these provisions a misdemeanor, punishable by up to one year in county jail and/or a fine of up to $20,000.

FISCAL EFFECT

Unknown, likely minor nonreimbursable increase in local incarceration as a result of increasing the maximum penalty from six months in county jail to

12 months, offset to a degree by an increase in fine revenue as a result of increasing the maximum fine from $1,000 to $20,000.

COMMENTS

1) Rationale Co-sponsored by the Human [sic] Society of the United States and the Humane Framing [sic] Association, this bill addresses the recent revelations regarding the mistreatment and slaughter of downed cattle at a California slaughterhouse and the sale of millions of pounds of meat from these animals, much of which was successfully recalled. This bill makes explicit that nonambulatory animals may not be butchered for human consumption at a slaughterhouse, increases the penalty for so doing, and specifies that nonambulatory animals that reach a slaughterhouse must be euthanized.

2) Current law provides that no slaughterhouse, stockyard, or auction shall buy, sell, or receive a non-ambulatory animal. In addition, no slaughterhouse, stockyard, auction, market agency or dealer may hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises. A violation of these provisions is a misdemeanor, punishable by up to six months in county jail and/or a fine of up to $1,000.

3) Amendments

a) The author will propose an amendment prohibiting the intentional transport of a nonambulatory animal to a slaughterhouse, stockyard, auction, or dealer.

b) The bill deletes references to stockyards, auctions and dealers in relation to entities that may not buy, sell or process nonambulatory animals. The author may wish to restore these references.

Analysis Prepared by: Geoff Long / APPR. / (916) 319-2081

ASSEMBLY THIRD READING
AB 2098 (Krekorian)
As Amended April 23, 2008
Majority vote

PUBLIC SAFETY 6-1 APPROPRIATIONS 14-1

Ayes:	Solorio, Aghazarian, De La Torre, Ma, Portantino, Swanson	Ayes:	Leno, Caballero, Davis, DeSaulnier, Emmerson, Furutani, Huffman, Karnette, Krekorian, Lieu, Ma, Nakanishi, Nava, Solorio
Nays:	Anderson	Nays:	Walters

SUMMARY: Prohibits a slaughterhouse, stockyard, auction, market agency or dealer from buying, selling or receiving a nonambulatory animal. Specifically, this bill:

1) States that no slaughterhouse shall process, butcher, or sell meat or products of nonambulatory animals for human consumption.

2) Provides that no person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

3) State that no person shall accept a nonambulatory animal for transport or delivery to a slaughterhouse, stockyard, auction, market agency, or dealer.

4) Provides that a violation of these provisions is punishable by imprisonment in a county jail for a period not exceeding one year; by a fine of not more than $20,000; or by both that fine and imprisonment.

EXISTING LAW:

1) Provides that no slaughterhouse that is not inspected by the United States Department of Agriculture (USDA), stockyard, or auction shall buy, sell, or receive a non-ambulatory animal.

2) States that no slaughterhouse, stockyard, auction, market agency or dealer shall hold a non-ambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises.

3) States that while in transit or on the premises of a stockyard, auction, market agency, dealer or slaughterhouse, a non-ambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

4) States that except in cases where a different punishment is prescribed by law, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months; by a fine not exceeding $1,000; or both.

5) Defines "non-ambulatory" as unable to stand and walk without assistance.

6) Defines "animal" as live cattle, swine, sheep, or goats.

7) Provides except as otherwise provided, every person who maliciously and intentionally maims, mutilates, tortures or wounds a living animal, or maliciously and intentionally kills an animal, is guilty of an offense-punishable in the state prison, or by a fine of not more than $20,000, or both the fine and imprisonment; or, alternatively, by imprisonment in a county jail for not more than one year, or by a fine of not more than $20,000 or by both the fine and imprisonment.

FISCAL EFFECT: According to the Assembly Appropriations Committee, unknown, likely minor non-reimbursable increase in local incarceration as a result of increasing the maximum penalty from six months in county jail to 12 months, offset to a degree by an increase in fine revenue as a result of increasing the maximum fine from $1,000 to $20,000.

COMMENTS: According to the author, "On January 30, 2008, the Humane Society of the United States released video documentation of the horrific abuse of downed cattle at a California meat packing company. 'Downed' cattle are defined as being too diseased and/or disabled to stand or walk without assistance.

Images of workers repeatedly kicking, electrocuting, ramming with forklifts and even spraying water down the noses of the animals sent shockwaves throughout the nation.

"It was soon revealed that nearly 37 million pounds of the contaminated beef ended up in both California's and the nation's school lunch programs. Public health professionals have long warned that meat derived from downed animals has a much increased susceptibility to passing on the E. coli virus, mad cow disease, and salmonella – all of which can lead to severe human health complications and even death.

"These revelations set off the largest beef recall (143 million pounds) in U.S. history due to the risks posed by this meat that has been deemed by the USDA as unfit for consumption. Unfortunately, much of this condemned beef has already been consumed by our nation's school children and the public at large. Worse still, due to the well-documented failings of the USDA inspection system, there is still no adequate system in place to prevent downed animals from continuing to enter our food supply. That is largely due to the fact that California law does not specifically prohibit the processing and sale of meat from non-ambulatory animals for human consumption, thus limiting the state's ability to prevent this occurrence.

"Current law does not prohibit the purchasing, slaughter, and sale of non-ambulatory animals for consumption. This bill will amend the Penal Code to include this vitally important safeguard. AB 2098 strengthens California's ability to protect animals, people, and our food supply by specifically prohibiting slaughterhouses or other entities from processing and selling meat from non-ambulatory animals for human consumption."

Please see the policy committee analysis for full discussion of this bill.

Analysis Prepared by: Kathleen Ragan / PUB. S. / (916) 319-3744 FN: 0004353

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 651-1520 Fax: (916) 327-4478

AB 2098

THIRD READING

Bill No: AB 2098
Author: Krekorian (D), et al
Amended: 4/23/08 in Assembly
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 4-0, 06/17/08
AYES: Romero, Margett, Cedillo, Cogdill
NO VOTE RECORDED: Perata

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

ASSEMBLY FLOOR: 75-0, 05/15/08 – See last page for vote

SUBJECT: Animals: nonambulatory: cruelty

SOURCE: Humane Farming Association

DIGEST: This bill makes it a misdemeanor to buy, sell, process or butcher, meat or products of a nonambulatory animal for human consumption and to provide fro [sic] property [sic] handling of a nonambulatory animal, as specified.

ANALYSIS: Existing law states, except as otherwise provided, every person who maliciously and intentionally maims, mutilates, tortures or wounds a

living animal, or maliciously and intentionally kills an animal, is guilty of an offense punishable in the state prison, or by a fine of not more than $20,000, or both the fine and imprisonment, or, alternatively, by imprisonment in a county jail for not more than one year or by a fine of not more than $20,000 or by both the fine and imprisonment.

Existing law states that any person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink or shelter, any animal, and whoever, having the charge or custody of the animal either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses the animal or uses the animal when unfit for labor is, for every such offense, guilty of a crime punishable as a misdemeanor or felony or alternatively punishable as a misdemeanor or felony and by a fine of not more than $20,000.

Existing law provides that no slaughterhouse that is not inspected by the United States Department of Agriculture (USDA), stockyard, or auction shall buy, sell, or receive a non-ambulatory animal.

This bill provides that no slaughterhouse, stockyard, auction, market agency or dealer shall buy, sell or receive a nonambulatory animal.

This bill further provides that no slaughterhouse shall process, butcher or sell meat or products of nonambulatory animals for human consumption, or

shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.

Existing law states that no slaughterhouse, stockyard, auction, market agency or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises.

This bill provides that no stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

Existing law states that while in transit or on the premises of a stockyard, auction, market agency, dealer or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

This bill provides that no person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

This bill provides that no person shall accept a nonambulatory animal for transport or deliver to a slaughterhouse, stockyard, auction, market agency, or dealer.

Existing law defines "nonambulatory" as unable to stand and walk without assistance.

Existing law defines "animal" as live cattle, swine, sheep, or goats.

Existing law states that as used in this bill, "humanely euthanized" means to kill by a mechanical, chemical or electrical method that rapidly and effectively renders the animal insensitive to pain.

Existing law provides that a violation of this bill is a misdemeanor punishable by imprisonment in a county jail not exceeding six months and/or by a fine not exceeding $1,000.

This bill provides that the penalty for a violation of this bill is a misdemeanor punishable by up to one year in the county mail [sic] and/or by a fine of not more than $20,000.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

SUPPORT: (Verified 6/30/08)

Humane Farming Association (source)
California Cattlemen's Association
California Federation for Animal Legislation
State Humane Association of California
American Society for the Prevention of Cruelty to Animals

ARGUMENTS IN SUPPORT: According to the author's office, "On January 30, 2008, the Humane Society of the United States released video documentation of the horrific abuse of downed cattle at a California meat packing company. 'Downed' cattle are defined as being too diseased and or disabled to stand

or walk without assistance. Images of workers repeatedly kicking, electrocuting, ramming with forklifts, and even spraying water down the noses of these animals sent shockwaves throughout the nation.

"It was soon revealed that nearly 37 million pounds of the contaminated beef ended up both in California's and the nation's school lunch programs. Public health professionals have long warned that meat derived from downed animals has a much increased susceptibility to passing the E. coli virus, mad cow disease, and salmonella – all of which can lead to severe human health complications and even death.

"These revelations set off the larges [sic] beef recall (143 million pounds) in U.S. history due to the risks posed by this meat that has been deemed by the USDA as unfit for consumption. Unfortunately, much of this condemned beef has already been consumed by our nation's school children and the public at large. Worse still, due to the well-documented failings of the USDA inspection system, there is still no adequate system in place to prevent downed animals from continuing to enter our food supply. That is largely due to the fact that California law does not specifically prohibit the processing and sale of meat from nonambulatory animals for human consumption, thus limiting the state's ability to prevent this occurrence."

ASSEMBLY FLOOR:

AYES: Adams, Aghazarian, Anderson, Arambula, Beall, Benoit, Berg, Berryhill, Blakeslee, Brownley, Caballero, Charles Calderon, Carter, Cook, Coto, Davis, De La Torre, De Leon,

DeSaulnier, DeVore, Duvall, Emmerson, Eng, Evans, Feuer, Fuentes, Fuller, Furutani, Gaines, Galgiani, Garcia, Hancock, Hayashi, Hernandez, Horton, Houston, Huff, Huffman, Jeffries, Jones, Keene, Krekorian, La Malfa, Laird, Leno, Levine, Lieber, Lieu, Ma, Maze, Mendoza, Mullin, Nakanishi, Nava, Niello, Parra, Plescia, Portantino, Price, Sharon Runner, Ruskin, Salas, Saldana, Silva, Smyth, Solorio, Spitzer, Strickland, Swanson, Torrico, Tran, Villines, Walters, Wolk, Bass

NO VOTE RECORDED: Dymally, Garrick, Karnette, Nunez, Soto

RJG:cm 6/30/08 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

* * * * END * * * *

SENATE COMMITTEE ON PUBLIC SAFETY
Senator Gloria Romero, Chair
2007-2008 Regular Session

AB 2098 (Krekorian)
As Amended April 23, 2008
Hearing date: June 17, 2008
Penal Code
MK:mc

A B 2 0 9 8

ANIMALS: NONAMBULATORY: CRUELTY

HISTORY

Source: Humane Farming Association

Prior Legislation: SB 692 (Roberti) – Chapter 600, Statutes 1994

Support: California Cattlemen's Association; California Federation for Animal Legislation; State Humane Association of California; American Society for the Prevention of Cruelty to Animals

Opposition: None known

Assembly Floor Vote: Ayes 75 – Noes 0

KEY ISSUES

SHOULD IT BE A MISDEMEANOR TO PROCESS, BUTCHER, OR SELL MEAT OR PRODUCTS OF A NONAMBULATORY ANIMAL FOR HUMAN CONSUMPTION?

SHOULD IT BE A MISDEMEANOR FOR A SLAUGHTERHOUSE TO PROCESS OR HOLD A NONAMBULATORY ANIMAL WITHOUT TAKING IMMEDIATE ACTION TO HUMANELY EUTHANIZE THE ANIMAL?

SHOULD IT BE A MISDEMEANOR FOR A STOCKYARD, AUCTION, MARKET AGENCY, OR DEALER TO HOLD A NONAMBULATORY ANIMAL WITHOUT TAKING IMMEDIATE ACTION TO HUMANELY EUTHANIZE THE ANIMAL OR PROVIDE IMMEDIATE VETERINARY TREATMENT?

SHOULD IT BE A MISDEMEANOR TO SELL, SHIP, ETC., A NONAMBULATORY ANIMAL TO A SLAUGHTERHOUSE, STOCKYARD, AUCTION, MARKET AGENCY OR DEALER OR TO ACCEPT A NONAMUBLATORY [sic] ANIMAL FOR DELIVERY TO THE SAME?

PURPOSE

The purpose of this bill is to make it a misdemeanor to buy, sell, process or butcher, meat or products of a nonambulatory animal for human consumption and to provide for proper handling of a nonambulatory animal, as specified?

Existing law states, except as otherwise provided, every person who maliciously and intention-ally maims, mutilates, tortures or wounds a living animal, or maliciously and intentionally kills an animal, is guilty of an offense punishable in the state prison, or

by a fine of not more than $20,000, or both the fine and imprisonment, or, alternatively, by imprisonment in a county jail for not more than one year, or by a fine of not more than $20,000 or by both the fine and imprisonment. (Penal Code 597(a).)

Existing law states that any person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink or shelter, any animal, and whoever, having the charge or custody of the animal either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses the animal or uses the animal when unfit for labor is, for every such offense, guilty of a crime punishable as a misdemeanor or felony or alternatively punishable as a misdemeanor or felony and by a fine of not more than $20,000. (Penal Code 597(b).)

Existing law provides that no slaughterhouse that is not inspected by the United States Department of Agriculture (USDA), stockyard, or auction shall buy, sell, or receive a non-ambulatory animal. (Penal Code 599f(a).)

This bill provides instead that no slaughterhouse, stockyard, auction, market agency or dealer shall buy, sell or receive a nonambulatory animal.

This bill further provides that no slaughterhouse shall process, butcher or sell meat or products of nonambulatory animals for human consumption, or

shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.

Existing law states that no slaughterhouse, stockyard, auction, market agency or dealer shall hold a non-ambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises. (Penal Code 599f(b).)

This bill provides instead that no stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

Existing law states that while in transit or on the premises of a stockyard, auction, market agency, dealer or slaughterhouse, a non-ambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance. (Penal Code 599f(c).)

This bill provides that no person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

This bill provides that no person shall accept a nonambulatory animal for transport or delivery to a slaughterhouse, stockyard, auction, market agency, or dealer.

Existing law defines "non-ambulatory" as unable to stand and walk without assistance. (Penal Code 599f(e).)

Existing law defines "animal" as live cattle, swine, sheep, or goats. (Penal Code 599f(f).)

Existing law states that as used in this section, "humanely euthanized" means to kill by a mechanical, chemical or electrical method that rapidly and effectively renders the animal insensitive to pain. (Penal Code 599f(g).)

Existing law provides that a violation of this section is a misdemeanor punishable by imprisonment in a county jail not exceeding six months and/or by a fine not exceeding $1,000. (Penal Code 599f(d).)

This bill provides that the penalty for a violation of this section is a misdemeanor punishable by up to one year in the county jail and/or by a fine of not more than $20,000.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION IMPLICATIONS

California continues to face an extraordinary and severe prison and jail overcrowding crisis. California's prison capacity remains nearly exhausted as prisons today continue to be operated with a significant level

of overcrowding.[1] A year ago, the Legislative Analyst's office summarized the trajectory of California's inmate population over the last two decades:

> During the past 20 years, jail and prison populations have increased significantly. County jail populations have increased by about 66 percent over that period, an amount that has been limited by court-ordered population caps. The prison population has grown even more dramatically during that period, tripling since the mid-1980s.[2]

The level of overcrowding, and the impact of the population crisis on the day-to-day prison operations, is staggering:

> As of December 31, 2006, the California Department of Corrections and Rehabilitation (CDCR) was estimated to have 173,100 inmates in the state prison system, based on CDCR's fall 2006 population projections. However, . . . the department only operates or contracts for a total of 156,500 permanent bed capacity (not including out-of-state beds, . . .), resulting in a shortfall of about 16,600 prison beds relative to the inmate population. The most significant bed shortfalls are for Level I, II, and IV inmates, as well as at

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[1] Analysis of the 2007-08 Budget Bill: Judicial and Criminal Justice, Legislative Analyst's Office (February 21, 2007); see also, court orders, infra.

[2] California's Criminal Justice System: A Primer. Legislative Analyst's Office (January 2007).

reception centers. As a result of the bed deficits, CDCR houses about 10 percent of the inmate population in temporary beds, such as in dayrooms and gyms. In addition, many inmates are housed in facilities designed for different security levels. For example, there are currently about 6,000 high security (Level IV) inmates housed in beds designed for Level III inmates.

. . . (S)ignificant overcrowding has both operational and fiscal consequences. Overcrowding and the use of temporary beds create security concerns, particularly for medium- and high-security inmates. Gyms and dayrooms are not designed to provide security coverage as well as in permanent housing units, and overcrowding can contribute to inmate unrest, disturbances, and assaults. This can result in additional state costs for medical treatment, workers' compensation, and staff overtime. In addition, overcrowding can limit the ability of prisons to provide rehabilitative, health care, and other types of programs because prisons were not designed with sufficient space to provide these services to the increased population. The difficulty in providing inmate programs and services is exacerbated by the use of program space to house inmates. Also, to the extent that inmate unrest is caused by overcrowding, rehabilitation programs and other

> services can be disrupted by the resulting lockdowns.[3]

As a result of numerous lawsuits, the state has entered into several consent decrees agreeing to improve conditions in the state's prisons. As these cases have continued over the past several years, prison conditions nonetheless have failed to improve and, over the last year, the scrutiny of the federal courts over California's prisons has intensified.

The federal court has appointed a receiver to take over the direct management and operation of the prison medical health care delivery system from the state. The crisis has continued to escalate and, in July of last year, the federal court established a three-judge panel to consider placing a cap on the number of prisoners allowable in California prisons. It is anticipated that the court will reach its decision this year.

In his order establishing the judicial panel, Judge Thelton Henderson stated in part:

> It is clear to the Court that the crowded conditions of California's prisons, which are now packed well beyond their intended capacity, are having – and in the absence of any intervening remedial action, will continue to have – a serious impact on the Receiver's ability to complete the job for which he was appointed: namely, to eliminate the unconstitutional

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[3] Analysis 2007-08 Budget Bill, supra, fn. 1.

conditions surrounding delivery of inmate medical health care.

> . . . (T)his case is also somewhat unique in that even Defendants acknowledge the seriousness of the overcrowding problem, which led the Governor to declare a state of emergency in California's prisons in October 2006. While there remains dispute over whether crowded conditions are the primary cause of the constitutional problems with the medical health care system in California prisons, or whether any relief other than a prisoner release order will remedy the constitutional deprivations in this case, there can be no dispute that overcrowding is at least part of the problem. . . . The record is equally clear that the Receiver will be unable to eliminate the constitutional deficiencies at issue in this case in a reasonable amount of time unless something is done to address the crowded conditions in California's prisons. This Court therefore believes that a three-judge court should consider whether a prisoner release order is warranted. . . . (Hon. Thelton Henderson, Order dated July 23, 2007 in Plata v. Schwarzenegger (N.D. Cal) No. C01-1351 TEH (citations omitted).)

Similarly, Judge Lawrence Karlton stated:

> There is no dispute that prisons in California are seriously and dangerously overcrowded. () The record suggests there will be no appreciable change in the prison population in the next two years. (Hon. Lawrence K. Karlton,

> Senior Judge, United States District Court, Order dated July 23, 2007 in Coleman v. Schwarzenegger (E.D. Cal.) No. S90-0520 LKK JFM P (citations omitted).)

This bill does not appear to aggravate the prison overcrowding crisis outlined above.

COMMENTS

1. Need for This Bill

According to the author:

> On January 30, 2008, the Humane Society of the United States released video documentation of the horrific abuse of downed cattle at a California meat packing company. "Downed" cattle are defined as being too diseased and/or disabled to stand or walk without assistance. Images of workers repeatedly kicking, electrocuting, ramming with forklifts, and even spraying water down the noses of these animals sent shockwaves throughout the nation.
>
> It was soon revealed that that [sic] nearly 37 million pounds of the contaminated beef ended up in both California's and the nation's school lunch programs. Public health professionals have long warned that meat derived from downed animals has a much increased susceptibility to passing on the E. coli virus, mad cow disease, and salmonella – all of which can lead to severe human health complications and even death.

These revelations set off the largest beef recall (143 million pounds) in U.S. history due to the risks posed by this meat that has been deemed by the USDA as unfit for consumption. Unfortunately, much of this condemned beef has already been consumed by our nation's school children and the public at large. Worse still, due to the well-documented failings of the USDA inspection system, there is still no adequate system in place to prevent downed animals from continuing to enter our food supply. That is largely due to the fact that California law does not specifically prohibit the processing and sale of meat from nonambulatory animals for human consumption, thus limiting the state's ability to prevent this occurrence.

2. Prohibition on "Downed" Cattle

While existing law provides that slaughterhouses not inspected by the United States Department of Agriculture, as well as stockyards and auctions, shall not buy, sell or receive a nonambulatory animal, this bill prohibits any slaughterhouse, stockyard, auction market agency or dealer from buying, selling, or receiving a nonambulatory animal. This bill also expressly prohibits a slaughterhouse from processing, butchering, or selling meat or products of nonambulatory animals for human consumption. This bill further prohibits holding a nonambulatory animal without immediately humanely euthanizing the animal or, if it is a stockyard, auction, market agency or dealer, from providing immediate veterinary

treatment to the animal. This bill also provides additional prohibitions on the shipping and selling of an animal to a slaughterhouse, stockyard, auction, market agency or dealer.

The penalty under existing law for buying, selling, or receiving a downed animal is a standard misdemeanor with up to six months in county jail and/or a fine up to $1,000 ($3,700 with penalty assessments). This bill increases the penalty, for the expanded misdemeanors in this bill to up to one year in the county jail and/or a fine of up to $20,000 ($74,000 with penalty assessments).[4] While a $20,000 fine is high for a misdemeanor, it is not unprecedented when public safety is a concern. For example, Health and Safety Code section 42400.2 provides for a misdemeanor with a $40,000 fine for violations of laws relating the emissions of air contaminant. It is also a misdemeanor with a $25,000 fine to violate specified provisions dealing with the certification of and record requirements of environmental labs. (Health and Safety Code 1000895.) A misdemeanor with a $25,000 fine also exists for interference with access to a health clinic or place of worship. (Penal Code 423.3.)

SHOULD IT BE A ONE YEAR MISDEMEANOR WITH A $20,000 FINE TO BUY, SELL, PROCESS

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[4] Currently, approximately 270% in penalty assessments is imposed on every criminal fine, this is a 100% increase from 2003-2004. (See Penal Code 1464, 1465.7, 1465.8 and Gov. Code 7600.5, 70372 76000 et. seq., 76104.6.)

OR SHIP, ETC., NONAMBULATORY ANIMALS THAT ARE INTENDED FOR HUMAN CONSUMPTION?

3. Support

The Humane Society of the United States states:

> On behalf of the nation's largest animal protection organization backed by 10 million Americans, with over 1,200,000 members and constituents in California, the Humane Society of the United States (HSUS) is in support of AB 2098 and is pleased to be a cosponsor of the bill. AB 2098 addresses the issue of 'downed' animals being processed at slaughterhouses for human consumption.
>
> "Downed" cattle are defined as being too diseased and/or disabled to stand or walk without assistance. Current law in California requires that downed animals be immediately euthanized or humanely removed from the premises. California has limited ability in preventing meat that is classified as unfit for human consumption from passing to the general public. AB 2098 specifically states that "No slaughterhouse, stockyard, or auction shall sell meat or products of nonambulatory animals for consumption."
>
> HSUS released a video in January of this year which depicted the inhumane treatment of downed animals at a California slaughterhouse. The video showed workers electrocuting, kicking, ramming with forklifts and spraying water into the nostrils of

the disabled cows. As a result of the video and the subsequent investigation, 143 million pounds of beef were recalled. However, 37 million pounds of the contaminated meat ended up in school lunch programs across the nation.

Public health officials warn that downed cattle have increased susceptibility of passing on the E. coli virus, mad cow disease, and salmonella – all of which can lead to severe human health complications and even death.

* * *

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
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AB 2098

THIRD READING

Bill No: AB 2098
Author: Krekorian (D), et al
Amended: 4/23/08 in Assembly
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 4-0, 06/17/08
AYES: Romero, Margett, Cedillo, Cogdill
NO VOTE RECORDED: Perata

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

ASSEMBLY FLOOR: 75-0, 05/15/08 – See last page for vote

SUBJECT: Animals nonambulatory: cruelty

SOURCE: Humane Farming Association

DIGEST: This bill makes it a misdemeanor to buy, sell, process or butcher, meat or products of a nonambulatory animal for human consumption and to provide fro [sic] property [sic] handling of a nonambulatory animal, as specified.

ANALYSIS: Existing law states, except as otherwise provided, every person who maliciously and intentionally maims, mutilates, tortures or wounds a

living animal, or maliciously and intentionally kills an animal, is guilty of an offense punishable in the state prison, or by a fine of not more than $20,000, or both the fine and imprisonment, or, alternatively, by imprisonment in a county jail for not more than one year or by a fine of not more than $20,000 or by both the fine and imprisonment.

Existing law states that any person, who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink or shelter, any animal, and whoever, having the charge or custody of the animal either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses the animal or uses the animal when unfit for labor is, for every such offense, guilty of a crime punishable as a misdemeanor or felony or alternatively punishable as a misdemeanor or felony and by a fine of not more than $20,000.

Existing law provides that no slaughterhouse that is not inspected by the United States Department of Agriculture (USDA), stockyard, or auction shall buy, sell, or receive a non-ambulatory animal.

This bill provides that no slaughterhouse, stockyard, auction, market agency or dealer shall buy, sell or receive a nonambulatory animal.

This bill further provides that no slaughterhouse shall process, butcher or sell meat or products of non-ambulatory animals for human consumption, or shall

hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.

Existing law states that no slaughterhouse, stockyard, auction, market agency or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises.

This bill provides that no stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

Existing law states that while in transit or on the premises of a stockyard, auction, market agency, dealer or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

This bill provides that no person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

This bill provides that no person shall accept a nonambulatory animal for transport or deliver to a slaughterhouse, stockyard, auction, market agency, or dealer.

Existing law defines "nonambulatory" as unable to stand and walk without assistance.

Existing law defines "animal" as live cattle, swine, sheep, or goats.

Existing law states that as used in this bill, "humanely euthanized" means to kill by a mechanical, chemical or electrical method that rapidly and effectively renders the animal insensitive to pain.

Existing law provides that a violation of this bill is a misdemeanor punishable by imprisonment in a county jail not exceeding six months and/or by a fine not exceeding $1,000.

This bill provides that the penalty for a violation of this bill is a misdemeanor punishable by up to one year in the county mail [sic] and/or by a fine of not more than $20,000.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

SUPPORT: (Verified 6/30/08)

Humane Farming Association (source)
California Cattlemen's Association
California Federation for Animal Legislation
State Humane Association of California
American Society for the Prevention of Cruelty to Animals

ARGUMENTS IN SUPPORT: According to the author's office, "On January 30, 2008, the Humane Society of the United States released video documentation of the horrific abuse of downed cattle at a California meat packing company. 'Downed' cattle are defined as being too diseased an/or [sic] disabled to

stand or walk without assistance. Images of workers repeatedly kicking, electrocuting, ramming with forklifts, and even spraying water down the noses of these animals sent shockwaves throughout the nation.

"It was soon revealed that nearly 37 million pounds of the contaminated beef ended up both in California's and the nation's school lunch programs. Public health professionals have long warned that meat derived from downed animals has a much increased susceptibility to passing the E. coli virus, mad cow disease, and salmonella – all of which can lead to severe human health complications and even death.

"These revelations set off the larges [sic] beef recall (143 million pounds) in U.S. history due to the risks posed by this meat that has been deemed by the USDA as unfit for consumption. Unfortunately, much of this condemned beef has already been consumed by our nation's school children and the public at large. Worse still, due to the well-documented failings of the USDA inspection system, there is still no adequate system in place to prevent downed animals from continuing to enter our food supply. That is largely due to the fact that California law does not specifically prohibit the processing and sale of meat from nonambulatory animals for human consumption, thus limiting the state's ability to prevent this occurrence."

ASSEMBLY FLOOR:

AYES: Adams, Aghazarian, Anderson, Arambula, Beall, Benoit, Berg, Berryhill, Blakeslee, Brownley, Caballero, Charles Calderon, Carter, Cook, Coto, Davis, De La Torre, De Leon,

DeSaulnier, DeVore, Duvall, Emmerson, Eng, Evans, Feuer, Fuentes, Fuller, Furutani, Gaines, Galgiani, Garcia, Hancock, Hayashi, Hernandez, Horton, Houston, Huff, Huffman, Jeffries, Jones, Keene, Krekorian, La Malfa, Laird, Leno, Levine, Lieber, Lieu, Ma, Maze, Mendoza, Mullin, Nakanishi, Nava, Niello, Parra, Plescia, Portantino, Price, Sharon Runner, Ruskin, Sales, Saldana, Silva, Smyth, Solorio, Spitzer, Strickland, Swanson, Torrico, Tran, Villines, Walters, Wolk, Bass

NO VOTE RECORDED: Dymally, Garrick, Karnette, Nunez, Soto

RJG:cm 6/30/08 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 651-1520 Fax: (916) 327-4478

AB 2098

THIRD READING

Bill No: AB 2098
Author: Krekorian (D), et al
Amended: 4/23/08 in Assembly
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 4-0, 06/17/08
AYES: Romero, Margett, Cedillo, Cogdill
NO VOTE RECORDED: Perata

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

ASSEMBLY FLOOR: 75-0, 05/15/08 – See last page for vote

SUBJECT: Animals: nonambulatory: cruelty

SOURCE: Humane Farming Association

DIGEST: This bill makes it a misdemeanor to buy, sell, process or butcher, meat or products of a nonambulatory animal for human consumption and to provide for property [sic] handling of a non-ambulatory animal, as specified.

ANALYSIS: Existing law states, except as otherwise provided, every person who maliciously and intentionally maims, mutilates, tortures or wounds a

living animal, or maliciously and intentionally kills an animal, is guilty of an offense punishable in the state prison, or by a fine of not more than $20,000, or both the fine and imprisonment, or, alternatively, by imprisonment in a county jail for not more than one year or by a fine of not more than $20,000 or by both the fine and imprisonment.

Existing law states that any person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink or shelter, any animal, and whoever, having the charge or custody of the animal either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses the animal or uses the animal when unfit for labor is, for every such offense, guilty of a crime punishable as a misdemeanor or felony or alternatively punishable as a misdemeanor or felony and by a fine of not more than $20,000.

Existing law provides that no slaughterhouse that is not inspected by the United States Department of Agriculture (USDA), stockyard, or auction shall buy, sell, or receive a non-ambulatory animal.

This bill provides that no slaughterhouse, stockyard, auction, market agency or dealer shall buy, sell, or receive a nonambulatory animal.

This bill further provides that no slaughterhouse shall process, butcher or sell meat or products of non-ambulatory animals for human consumption, or shall

hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.

Existing law states that no slaughterhouse stockyard, auction, market agency or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises.

This bill provides that no stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

Existing law states that while in transit or on the premises of a stockyard, auction, market agency, dealer on slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

This bill provides that no person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

This bill provides that no person shall accept a nonambulatory animal for transport or deliver to a slaughterhouse, stockyard, auction, market agency, or dealer.

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FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

SUPPORT: (Verified 6/30/08)

Humane Farming Association (source)
California Cattlemen's Association
California Federation for Animal Legislation
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DeSaulnier, DeVore, Duvall; Emmerson, Eng, Evans, Feuer, Fuentes, Fuller, Furutani, Gaines, Galgiani, Garcia, Hancock, Hayashi, Hernandez, Horton, Houston, Huff, Huffman, Jeffries, Jones, Keene, Krekorian, La Malfa, Laird, Leno, Levine, Lieber, Lieu, Ma, Maze, Mendoza, Mullin, Nakanishi, Nava, Niello, Parra, Plescia, Portantino, Price, Sharon Runner, Ruskin, Salas, Saldana, Silva, Smyth, Solorio, Spitzer, Strickland; Swanson, Torrico, Tran, Villines, Walters, Wolk, Bass

NO VOTE RECORDED: Dymally, Garrick, Karnette, Nunez, Soto

RJG:cm 7/1/08 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

* * * * END * * * *

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NATIONAL MEAT ASSOCIATION

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

NATIONAL MEAT ASSOCIATION, a not-for-profit corporation, Plaintiff, and	CASE NO: 1:08-cv-01963-LJO-DLB

AMERICAN MEAT INSTITUTE, a not-for-profit corporation,

Plaintiff-Intervenor,

v.

EDMUND GERALD BROWN, in his official capacity as Attorney General of California, ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California, and the STATE OF CALIFORNIA,

Defendants.

SUPPLEMENTAL DECLARATION OF BARBARA MASTERS IN SUPPORT OF PLAINTIFF NATIONAL MEAT ASSOCIATION'S MOTION FOR PRELIMINARY INJUNCTION

(Filed Feb. 4, 2009)

Date: March 16, 2009
Time: 3:00 p.m.
Courtroom: 4
Judge:
Hon. Lawrence J. O'Neill

SUPPLEMENTAL DECLARATION OF BARBARA MASTERS

I, Barbara Masters, declare as follows:

1. I am a Veterinarian and Senior Policy Advisor with Olsson, Frank, Weeda, Terman, Bode and Matz with eighteen years prior experience working for the Food Safety and Inspection Service ("FSIS"), including serving in the capacity as the FSIS Administrator for three years. In my previous and current positions, I was and am responsible for providing guidance to the meat industry to ensure compliance with the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601 *et seq.* In particular, while at FSIS, I was responsible for enforcing the FMIA and the implementing regulations. I assisted in developing training

material and Directives (instructions for in-plant employees) to follow on making livestock dispositions at the slaughterhouses. I have personal knowledge of the following facts or knowledge of such facts based upon review of relevant public records or business documents. If called as a witness, I could competently testify thereto.

2. I have reviewed the declaration of Dr. Michael Greger and the attachments thereto, submitted in support of the Proposed Intervenor-Defendants' Response to National Meat Association's ("NMA") Motion for a Preliminary Injunction. Neither Dr. Greger, nor the articles that he cites, support a finding that the consumption of meat or meat products from nonambulatory swine slaughtered at a federally-inspected facility have ever caused or pose a risk of causing a human health concern.

3. In fact, the majority of Dr. Greger's concerns regarding human health risks due to foodborne transmissible diseases from nonambulatory animals relate to diseases found in cattle or sheep, not pigs. Although Dr. Greger contends that "nonambulatory animals can be at a heightened risk for bovine spongiform encephalopathy ('BSE')," he fails to acknowledge that no case of naturally-acquired BSE has ever been reported in pigs, and therefore there is no determinable risk that a hog has become nonambulatory (as defined in California Penal Code § 599f) as a result of BSE or a transmissible spongiform encephalopathy ("TSE"), or that the slaughter and processing of

nonambulatory swine could result in BSE-infected meat entering the food supply.

4. None of the articles cited by Dr. Greger connect BSE to pigs, nonambulatory or otherwise, or to a human health risk based on the consumption of meat from a nonambulatory hog. Dr. Greger notes that "[d]owned *cattle* are more likely to be infected with BSE" and that "[t]he consumption of meat products derived from BSE-infected *cattle* is believed to cause a human neurological disease known as variant Creuzfeldt-Jakob disease ("vCJD")." He further notes that *sheep* and *goats* may be infected with another form of spongiform encephalopathy known as "scrapie," but acknowledges that "scrapie has not conclusively been shown to be able to infect humans." Although Dr. Greger contends that "[p]igs are also known to be susceptible to BSE infection, and epidemiological studies have suggested a link between pork consumption and human Cruezfeldt-Jakob disease," the study he cites in support of his position does not, in fact, support his statement. In fact, the study indicates that "scrapie has not been reported in pigs," and hypothesizes only that "a subclinical form of the disease or a pig reservoir for the scrapie agent *might conceivably exist*." *See* Greger Decl., Ex. O (emphasis added). Moreover, the study does not say anything about BSE or scrapie as it relates to nonambulatory pigs at a federally-inspected swine slaughterhouse or the meat or meat products from those pigs.

5. Dr. Greger also cites to a study of "downed pigs" which, according to Dr. Greger, "found that nonambulatory pigs were highly significantly more likely to test positive for swine influenza . . . [as] compared with control pigs" and expressed "concern that pigs can act as influenza 'mixing vessels' and create new strains of virus that can infect humans." Dr. Greger omits, however, that swine influenza is not caused by the consumption of meat or meat products from pigs, but rather *exposure* to an infected animal. Therefore, swine influenza generally appears, if at all, in persons occupationally exposed to pigs. *See* Exs. 1 (Center for Disease Control "Key Facts About Swine Influenza") & 2 (AVMA "Backgrounder: Swine Influenza"). Moreover, Dr. Greger fails to acknowledge the fact that federal regulations consider the handling of hogs infected with high fever and septicemia (which could include swine influenza), and require such hogs to be condemned and removed from the food supply. *See* 9 C.F.R. § 309.3(b), (c).

6. Dr. Greger also cites anthrax as another disease that may infect the meat supply and human health issues related to the exposure of humans to "downed cows" and "sick sheep." Again, Dr. Greger fails to identify any risk associated with the consumption of meat from nonambulatory pigs slaughtered at a federally-inspected facility. In fact, Dr. Greger omits that the very article he cites acknowledges that "[g]astroinsestinal anthrax *never has been documented in the United States* because livestock are vaccinated for anthrax in areas where the disease is

endemic; animals routinely are inspected by federal and state meat inspectors before, during, and after slaughter; and raw meat is eaten infrequently." *See* Greger Decl., Ex. S (emphasis added); *see also* Supp. Masters Decl., Ex. 3 at 2 ("No cases of gastrointestinal anthrax have been reported in the United States during the 20th or 21st centuries."). "Gastrointestinal anthrax" is the only type of anthrax poisoning that results from the consumption of contaminated meat. *See id.* at 2 (AVMA "Backgrounder: Anthrax"). Moreover, as the article cited by Dr. Greger suggests, federal regulations address anthrax-infected livestock and require such livestock to be condemned and removed from the human food supply. *See* 9 C.F.R. §§ 309.7 ("Any livestock found on ante-mortem inspection to be affected with anthrax shall be identified as U.S. Condemned and disposed of in accordance with § 309.13"); 310.9 (requiring carcasses infected with anthrax to be condemned). Thus, there is no measurable risk that a nonambulatory pig that is infected with anthrax poses any risk to the human food supply.

7. In addition, Dr. Greger identifies *E. coli* and *salmonella* as potential risks to human health related to nonambulatory animals. But the article that he cites addresses downed cows and dairy cows infected with *E. coli* O157 and the author's conclusion that "downer dairy cattle harboring *E. coli* O157:H7 at slaughter may be an important source of contamination and may contribute appreciably to the health risk associated with ground beef." Neither the article,

nor Dr. Greger, links the *E. coli* O157 bacteria to the consumption of meat from a nonambulatory hog processed at a federally-inspected slaughterhouse. Further, it is important to note that this article is based on a small population (2 plants) in one geographical location. In fact, the author's note indicates, "additional studies including a larger number of animals, broader geographical scope and extended sampling period are needed to determine if the difference in the initial study is indeed significant." Similarly, Dr. Greger has not identified any evidence that the consumption of meat from nonambulatory hogs at a federally-inspected facility has ever been linked to a human health issue involving *salmonella*. And again, Dr. Greger fails to mention that the federal regulations specifically require slaughterhouses to test swine for generic *E. coli* and that FSIS tests for *salmonella*. *See* 9 C.F.R. § 310.25.

8. Finally, Dr. Greger identifies "brucellosis, Johne's disease, *Listeria moncytogenes*, and *Streptococcus suis*" and "*Campylobacter*" as other livestock diseases that may pose a risk to human health, but he fails to link those diseases to hogs (nonambulatory or otherwise) or to the consumption of hog meat from a federally-inspected facility. Again, the federal regulations contain myriad provisions regarding the handling and disposition of diseased animals to ensure that those diseases do not enter the food supply. *See* 9 C.F.R. §§ 309.1 through 311.39. Further, in the case of *Campylobacter*, research has demonstrated that chilling swine carcasses during slaughter is

efficient to control this organism. *See* Ex. 4 (Journal of Food Protection–Prevalence of *Campylobacter* within Swine Slaughter and Processing Facility).

9. In addition to his failure to link the consumption of meat from nonambulatory hogs to a human health issue, Dr. Greger recognizes that nonambulatory hogs often fully recover after an opportunity to rest. Indeed, several of the articles cited by Dr. Greger acknowledge that nonambulatory hogs usually recover and that such hogs are routinely passed by federal inspectors for human consumption. *See* Greger Decl., Ex. D at 7 (research "suggests that [pigs that become nonambulatory during handling] can recover from handling stress if allowed to rest" for up to 2 hours); Ex. H at 1 ("Most fatigued pigs will recover from this condition if rested and will return to normal appearance and mobility."); Ex. I at 6 ("A hog that has overexerted himself must be allowed to rest."); Ex. J at 23 ("With a veterinary certificate, non-ambulatory pigs should be moved as soon as possible to the nearest slaughter facility."). This is consistent with the AVMA's animal welfare position that nonambulatory hogs may be allowed up to 2 hours to recover. *See* Ex. 5 (AVMA policy regarding "Disabled Livestock").

10. Moreover, federal regulations specifically address the concerns expressed by Dr. Greger regarding pigs that become nonambulatory in transit. They require such pigs to be tagged as "U.S. Suspect" and set aside for recovery and federal inspection or, in certain instances where the hog becomes immobile as

a result of specific disease, require the hog to be tagged as "U.S. Condemned" and removed from the food supply. *See* 9 C.F.R. §§ 309.2 & 309.3.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 4 day of February, 2009, at Washington, District of Columbia.

/s/ Barbara Masters
(original signature retained
by Heather McCann)
BARBARA MASTERS

PETITIONER'S BRIEF

No. 10-224

Supreme Court, U.S.
FILED
[illegible] 2 2 2011

In The
Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

KAMALA D. HARRIS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

The Federal Meat Inspection Act (FMIA), as amended by the Wholesome Meat Act of 1967 and the Humane Methods of Slaughter Act of 1978, comprehensively regulates the "premises, facilities, and operations" of slaughterhouses where meat is prepared for human consumption. Since the passage of the Wholesome Meat Act, the FMIA has expressly preempted state regulations "in addition to, or different than" federal regulations. 21 U.S.C. § 678. Thus, for almost half a century, a uniform federal regulatory framework has safeguarded animal and human health and safety. In 2008, California passed a law – the provisions of which were later considered and expressly rejected by federal regulators – prohibiting federally-inspected slaughterhouses from holding any nonambulatory animal and requiring those slaughterhouses to "immediately euthanize" any such animal on its premises, thereby eliminating important federally-required ante-mortem inspection of possibly diseased animals. In addition, for the first time, the California law prohibited federally-inspected slaughterhouses from purchasing, receiving, processing, butchering, and selling nonambulatory animals.

The questions presented in this case are:

1. Did the Ninth Circuit err in holding that a "presumption against preemption" requires a "narrow interpretation" of the FMIA's express preemption

QUESTIONS PRESENTED – Continued

provision, in conflict with this Court's decision in *Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977), that the provision must be given "a broad meaning"?

2. Where federal food safety and humane handling regulations specify that animals (here, swine) which are or become nonambulatory on federally-inspected premises are to be separated and held for observation and further disease inspection, did the Ninth Circuit err in holding that a state criminal law which requires that such animals not be held for observation and disease inspection, but instead be immediately euthanized, was not preempted by the FMIA?

3. Did the Ninth Circuit err in holding more generally that a state criminal law which states that no slaughterhouse may buy, sell, receive, process, butcher, or hold a nonambulatory animal is not a preempted attempt to regulate the "premises, facilities, [or] operations" of federally-regulated slaughterhouses?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The petitioner, National Meat Association (NMA), is a nonprofit trade association whose members are meat packers, processors, suppliers, and equipment manufacturers located throughout the United States and in other countries. NMA, Frequently Asked Questions, http://nmaonline.org/about/faqs. NMA brought suit against Respondents the Attorney General of California (then Edmund G. Brown, Jr., now Kamala D. Harris), the Governor of California (then Arnold Schwarzenegger, now Edmund G. Brown, Jr.), and the State of California, seeking preliminary and permanent injunctive relief and a declaration barring the application of California Penal Code § 599f to federally-inspected swine slaughterhouses in the State. The Humane Society of the United States, Farm Sanctuary, Inc., Humane Farming Association, and Animal Legal Defense Fund were permitted to intervene as defendants and are Respondents here. The American Meat Institute also intervened, as a plaintiff seeking only permanent injunctive relief with respect to all other livestock governed by Section 599f, and thus was not a party to the preliminary injunction hearing or the appeal to the Ninth Circuit, and is not a party in this Court.

Pursuant to Supreme Court Rule 29.6, undersigned counsel state that NMA is an association, not a nongovernmental corporation, and therefore is not required to file a Corporate Disclosure Statement pursuant to Sup. Ct. R. 29.6.

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BRIEF FOR PETITIONER

Petitioner National Meat Association (NMA) respectfully submits that the judgment of the court of appeals should be reversed.

OPINIONS BELOW

The district court's opinion (Pet. App. 18a) is unreported. The opinion of the court of appeals (Pet. App. 1a) is reported at 599 F.3d 1093. The order denying the petition for rehearing and rehearing en banc (Pet. App. 57a) is unreported. The order of the court of appeals staying the mandate pending this Court's final disposition (Pet. App. 54a) is also unreported.

JURISDICTION

The court of appeals filed its opinion on March 31, 2010. Pet. App. 2a. A timely petition for rehearing and rehearing en banc was denied on May 18, 2010. Pet. App. 57a. A petition for a writ of certiorari was filed on August 13, 2010. This Court granted the petition on June 27, 2011, and has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, Article VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Relevant provisions of the Federal Meat Inspection Act, 21 U.S.C. § 601, *et seq.*, its implementing regulations, USDA's Food Safety and Inspection Service Directives, and California Penal Code § 599f are set forth in the appendix to this brief.

STATEMENT OF THE CASE

I. THE FEDERAL LAW

The Federal Meat Inspection Act (FMIA or Act), 21 U.S.C. § 601 *et seq.*, comprehensively regulates federally-inspected slaughterhouses to ensure the safety of meat and meat products prepared for human consumption and the humane handling of animals on slaughterhouse premises. The first Meat Inspection Act was passed in 1906, in response to disclosures of unsanitary conditions found in Chicago's

meat packing industry. *See* 40 Cong. Rec. 8728 (1906) (statement of Sen. Adams); 40 Cong. Rec. 9025-26 (1906) (statement of Sen. Gallinger). It established a federal inspection system to prevent "unsound, unhealthful, unwholesome, or otherwise unfit" meat and meat food products from moving in interstate and foreign commerce. Act of June 30, 1906, ch. 3913, 34 Stat. 674, 674 (1906); Act of March 4, 1907, ch. 2907, 34 Stat. 1260, 1260 (1907). As its name implies, one of the "plain object[s]" of the Act was to "enable the officials of the government to systematize and render effective the process of inspection." *United States v. Lewis*, 235 U.S. 282, 286-87 (1914). To that end, Congress established an "elaborate system of inspection of animals before slaughter, and of carcasses after slaughter and of meat-food products, with a view to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products in interstate and foreign commerce." *Pittsburgh Melting Co. v. Totten*, 248 U.S. 1, 4-5 (1918).

In 1967, motivated by concerns that intrastate meat was "not subject to adequate State or local inspection," House Committee on Agriculture, Wholesome Meat Act of 1967, H.R. Rep. No. 90-653, at 2 (1967), and by the need for "stronger, more effective and more uniform State inspection programs," *id.* at 14, Congress amended the FMIA by passing the Wholesome Meat Act, Pub. L. No. 90-201, 81 Stat. 584 (1967). Like its predecessor, the new legislation had "one basic and fundamental objective – to insure the wholesomeness and cleanliness of the entire meat

supply in th[e] United States." 113 Cong. Rec. 30512 (1967) (statement of Rep. May). To achieve that end, Congress recognized that "*Federal* standards must be required of all meat and meat food products," rather than the disparate or non-existent state inspection schemes then governing the intrastate meat industry. Senate Committee on Agriculture and Forestry, Wholesome Meat Act of 1967, S. Rep. No. 90-799, at 2-3 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2188, 2191 (emphasis added). The Act therefore required States regulating intrastate slaughtering operations to enact requirements "at least equal to those" applicable to federally-inspected slaughterhouses under Title I of the Act. § 15, 81 Stat. at 595-97 (codified at 21 U.S.C. § 661). With respect to those interstate slaughterhouses already subject to federal inspection under Title I, the Act made ante-mortem inspection of livestock to be slaughtered for meat mandatory,[1] and made it expressly clear that federal law provides the sole standards governing those slaughterhouses' operations.

Federal uniformity was accomplished by adding an express preemption provision to the FMIA. Legislators wanted it be clear that "States would be

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[1] The Wholesome Meat Act eliminated the Secretary's ability to act "at his discretion," instead requiring that "the Secretary *shall* cause to be made, by inspectors appointed for that purpose, an examination and inspection of all amenable species." 21 U.S.C. § 603(a) (as amended by § 3, 81 Stat. at 588) (emphasis added).

prohibited from imposing on federally inspected establishments requirements with respect to the premises, facilities, [and] operations . . . that were in addition to or different from those of the U.S. Department of Agriculture." 113 Cong. Rec. 33987 (1967) (statement of Sen. Dirksen). Accordingly, Congress explicitly set forth its intent that federal requirements exclusively govern federally-inspected slaughterhouses:

> *Requirements* within the scope of this chapter *with respect to premises, facilities and operations* of any establishment at which inspection is provided under subchapter I of this chapter, *which are in addition to, or different than those made under this chapter may not be imposed by any State*. . . .

21 U.S.C. § 678 (Section 408 of the FMIA) (emphasis added).

In 1978, consistent with its intent to uniformly regulate all aspects of federally-inspected slaughterhouse operations, Congress once again amended the FMIA by enacting the Humane Methods of Slaughter Act of 1978 (1978 HMSA) to ensure that all livestock on slaughterhouse grounds are handled and slaughtered "in accordance with humane methods." Pub. L. No. 95-445, Pmbl., 92 Stat. 1069, 1069 (1978). The 1978 HMSA built upon the Humane Methods of Slaughter Act of 1958, which prohibited the inhumane handling of livestock by slaughterhouses wishing to sell meat to the federal government. Pub. L. No. 85-765, § 3, 72 Stat. 862, 862 (1958). Through the 1978 HMSA, Congress sought to implement "humane

standards uniformly throughout the industry," House Agriculture Committee, 1978 HMSA, H.R. Rep. 95-1336, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2650, 2652, by "extend[ing] the requirements of the Humane Slaughter Act of 1958 to cover all slaughtering conducted under Federal and State inspection," including "not only slaughter, but preslaughter handling of livestock . . . from the time the animal arrives at the slaughter plant until the final stunning." 124 Cong. Rec. 24579-80 (1978) (statement of Sen. Dole).

In its current form, the FMIA, through regulations and directives promulgated under the Act and administered by the Food Safety and Inspection Service (FSIS), establishes a single, nationwide, comprehensive set of rules that governs the operations of federally-inspected slaughterhouses. *See* 21 U.S.C. § 601 *et seq.*; 9 C.F.R. part 300 *et seq.*; FSIS Directives 6000 Serics, *available at* http://www.fsis.usda.gov/Regulations_&_Policies/6000_Series-Slaughter_Inspection/index.asp. Congress explicitly provided for that regulation to begin at the front gate and to continue through post-slaughter operations:

> For the purpose of preventing the use in commerce of meat and meat food products which are adulterated, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all amenable species before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food

> products thereof are to be used in commerce; and all amenable species found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other cattle, sheep, swine, goats, horses, mules, or other equines, and when so slaughtered the carcasses of said cattle, sheep, swine, goats, horses, mules, or other equines shall be subject to a careful examination and inspection, all as provided by the rules and regulations to be prescribed by the Secretary, as provided for in this subchapter.

21 U.S.C. § 603(a). Implementing the statute's command, the "rules and regulations . . . prescribed by the Secretary" apply to every aspect of a federally-inspected slaughterhouse's operations, from the moment an animal arrives at the slaughterhouse facility through the time its meat is sold for human consumption.[2]

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[2] *See, e.g.*, 9 C.F.R. § 302.3 ("All livestock . . . entering any official establishment . . . shall be inspected [and] handled . . . as required by the regulations in this subchapter."); FSIS Directive 6900.2, Rev. 1, Part I, V.B. (Nov. 25, 2003) ("Once a vehicle carrying livestock enters an official slaughter establishment's premises, the vehicle is considered to be a part of that establishment's premises. The animals within that vehicle are to be handled in accordance with [9 C.F.R. §] 313.2."); FSIS Directive 6900.1, Rev. 1, Part I, VI.B. (Nov. 2, 1998) (similar); FSIS Directive 6100.1, Rev. 1, VIII.A. (Apr. 16, 2009) ("All animals that are on the premises of the establishment, on vehicles that are on the premises, or animals being handled in connection with slaughter . . . are to be handled humanely . . . in accordance with the requirements for the humane handling of livestock (9 C.F.R.

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313.2)."); 9 C.F.R. § 309.1(b) ("[A]nte-mortem inspection shall be made in pens on the premises of the establishment at which the livestock are offered for slaughter before the livestock shall be allowed to enter into any department of the establishment where they are to be slaughtered or dressed or in which edible products are handled."); 9 C.F.R. § 309.2(a) ("Any livestock which, on ante-mortem inspection, do not clearly show, but are suspected of being affected with any disease or condition that, under part 311 of this subchapter, may cause condemnation of the carcass on post-mortem inspection . . . shall be so handled as to retain its identity as a suspect until it is given final post-mortem inspection, when the carcass shall be marked and disposed of as provided in parts 310 and 311 of this subchapter, or until it is disposed of as otherwise provided in this part."); 9 C.F.R. § 309.2(b) ("All seriously crippled animals and non-ambulatory disabled livestock shall be identified as U.S. Suspects and disposed of as provided in § 311.1 of this subchapter unless they are required to be classed as condemned under § 309.3."); 9 C.F.R. § 309.5(a) ("All swine found by an inspector to be affected with hog cholera shall be identified as U.S. Condemned and disposed of in accordance with § 309.13. Immediate notification shall be given by the inspector to the official in the Veterinary Services unit of the Animal and Plant Health Inspection Service who has responsibility for the control of swine diseases in the State where the swine are located."); 9 C.F.R. § 310.1(a) ("A careful post-mortem examination and inspection shall be made of the carcasses and parts thereof of all livestock slaughtered at official establishments."); 9 C.F.R. § 311.1(a) ("The carcasses or parts of carcasses of animals slaughtered at an official establishment and found at the time of slaughter or at any subsequent inspection to be affected with any of the diseases or conditions named in this part shall be disposed of according to the section pertaining to the disease or condition: *Provided*, That no product shall be passed for human food under any section unless it is found to be otherwise not adulterated."); 21 U.S.C. § 601(m) (defining "adulterated"). Effective September 15, 2011, FSIS Directive 6900.2, Rev. 2 (Aug. 15, 2011) will cancel FSIS Directive 6900.1 and replace FSIS Directive 6900.2, Rev. 1. Similar to the Directives it replaces, the new Directive provides:

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Specific federal requirements govern operations with respect to livestock, including swine, that are or become nonambulatory[3] while on federally-inspected slaughterhouse premises. For hogs that have become nonambulatory during transit, federal regulations authorize the USDA inspector to enter the transport vehicle itself to perform ante-mortem inspection. FSIS Directive 6900.1, Rev. 1, Part I, III., VI.B.; *see also* FSIS Directive 6900.2, Rev. 2, Ch. II, I. (eff. Sept. 15, 2011). Swine that become nonambulatory while awaiting slaughter are to be separated, 9 C.F.R. § 313.2(d)(1), taken to a covered pen, *id.*, treated humanely[4] and held for inspection by federal inspectors, *id.* § 313.1(c). Once inspected, the hog is either to be classified as a "U.S. Suspect," *id.* § 309.2(b), and, if found to be safe, passed for slaughter and human

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"Once a vehicle carrying livestock enters, or is in line to enter, an official slaughter establishment's premises, the vehicle is considered to be a part of that establishment's premises. The animals within that vehicle are to be handled in accordance with 9 CFR 313.2." FSIS Directive 6900.2, Rev. 2, Ch. II, I.

[3] Federal regulations define "non-ambulatory disabled livestock" as "livestock that cannot rise from a recumbent position or that cannot walk, including, but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column, or metabolic conditions." 9 C.F.R. § 309.2(b).

[4] Federal regulations comprehensively provide for the humane treatment of livestock awaiting slaughter, including those being held for further inspection. *See, e.g.*, 9 C.F.R. §§ 313.2(d)(2), 313.2(e).

consumption, *id.* § 311.1(a),[5] or classified as condemned, *id.* §§ 309.2(b), 309.3, and humanely euthanized, *id.* § 309.13(a), pt. 313.

The record in this case provides examples of how the federal scheme works in practice. At one federally-inspected slaughterhouse in California, approximately 210 to 225 truckloads of hogs arrive each week, and approximately 7,700 hogs are processed each day. Joint Appendix (JA) at 15. A number of hogs delivered to this California facility become nonambulatory during transit, and approximately 225 per day become nonambulatory while awaiting slaughter. *Id.* at 15-16. For hogs, this symptom (being nonambulatory) is usually temporary and happens for a variety of reasons, most of which are benign.[6]

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[5] Livestock tagged as "U.S. Suspect" are carefully tracked by federal inspectors and reinspected after slaughter. *See, e.g.*, 9 C.F.R § 309.2(a) ("Any livestock which, on ante-mortem inspection, do not clearly show, but are suspected of being affected with any disease or condition that, under part 311 of this subchapter, may cause condemnation of the carcass on post-mortem inspection, and any livestock which show, on ante-mortem inspection, any disease or condition that, under part 311 of this subchapter would cause condemnation of only part of the carcass on post-mortem inspection, shall be so handled as to retain its identity as a suspect until it is given final post-mortem inspection, when the carcass shall be marked and disposed of as provided in parts 310 and 311 of this subchapter, or until it is disposed of as otherwise provided in this part."); *id.* pt. 310 (post-mortem inspection); *id.* pt. 311 (addressing disposal of diseased or otherwise adulterated carcasses and parts).

[6] On the other hand, a *cow's* inability to stand or walk is one symptom of bovine spongiform encephalopathy ("BSE"), making

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Some hogs become stressed or fatigued during transit and, therefore, cannot or will not stand or walk upon arrival. *Id.* at 15. Others become unable to do so, or refuse to do so, only after being removed from the truck and while awaiting slaughter. *Id.* at 16. As required by the regulations described above, these hogs are separated and held for inspection. The vast majority of nonambulatory pigs are merely overheated, stressed, fatigued, or stubborn and, if allowed to rest, will stand and walk unassisted. *Id.* at 15, 110. Those pigs are routinely passed by the inspectors for slaughter and human consumption. *Id.*

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the meat from that animal unsafe for human consumption. As a result, FSIS regulations and policy require that all nonambulatory *cattle* be condemned to minimize the risk of BSE. JA at 10-11; 9 C.F.R. § 309.3(e). Importantly, BSE is not a disease of swine; it does not occur naturally (*i.e.*, in a non-laboratory setting) in swine and is not transmissible to swine through natural means. JA at 11. Accordingly, there is no ascertainable risk that a nonambulatory hog may have become unable to move as a result of BSE, or that the slaughter and processing of nonambulatory swine could result in the introduction of BSE-infected swine meat into the food supply. *Id.*; *see also id.* at 105-06. For this reason, ante-mortem and post-mortem inspection is tailored under the FMIA to ensure that animals are observed for specific diseases unique to that individual species of livestock, *see, e.g.*, 9 C.F.R. pt. 309 (ante-mortem); FSIS Directive 6100.2, Rev. 1 (Sept. 17, 2007) (post-mortem), and FSIS requirements regarding nonambulatory livestock differ from species to species, *see* 9 C.F.R. § 309.3(e); FSIS Directive 6100.1, Rev. 1, VIII.B.2.b.; *see also* JA at 10-11.

Others, however, are actually sick or diseased, and are removed from the food supply.[7]

Thus, federal ante-mortem inspection is one of the principal means of early detection of serious communicable diseases. Indeed, "[t]here are some animal health conditions that can only be assessed when the livestock are alive," FSIS Directive 6100.1, Rev. 1, V., such as elevated temperature in swine with vesicular disease, 9 C.F.R. § 309.15(b). The ability to take emergency measures, such as segregation or quarantine of the entire lot of livestock and notification to higher officials, is dependent in substantial part on the early onsite detection of such diseases by federal veterinarians, or the inspectors they supervise, during

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[7] FSIS Directive 6100.1, Rev. 1, VIII.B.2.b. details the proper procedure for determining during ante-mortem inspection whether an animal is nonambulatory disabled, which includes being able to humanely help the animal rise by non-mechanical means ("e.g., providing a steadying hand"), and then, "once the animal has risen," permitting it "to ambulate without assistance, so that the PHV [Public Health Veterinarian] can observe it in motion." Generally, swine that are nonambulatory disabled are then slaughtered as "U.S. Suspect," *id.*, and are passed for human consumption upon clearing post-mortem inspection. Any nonambulatory swine, however, that are in a "dying condition," are "plainly showing on ante-mortem inspection any disease or condition that, under 9 CFR part 311, would cause the PHV to condemn the carcass when inspecting post-mortem," have "a temperature of 106°F or higher," are "in a comatose or semi comatose condition," or "have any other condition that would preclude the release of the animal for slaughter," are instead condemned and barred from slaughter and human consumption. *Id.* at VIII.D.

ante-mortem inspection. *See, e.g.*, 9 C.F.R. §§ 309.5, 309.15; FSIS Directive 6000.1, Rev. 1, VI., VII. (Aug. 3, 2006). Timely detection allows FSIS officials to quarantine facilities, trace the outbreak of disease to its source, and take immediate action to minimize its spread. *See, e.g.*, 9 C.F.R. §§ 309.5(a), 309.7(b). Ante-mortem inspection is not used solely to address an individual animal that presents with a symptom of a possibly disabling condition or disease on slaughter-house premises; rather, ante-mortem inspection of a nonambulatory pig is needed to determine what kind of disease (if any) is at issue, so that, where necessary, the rest of the lot and even the herd of origin may be tested to see if any other, still ambulatory pigs have that disease, even though they are not yet manifesting symptoms. *See, e.g.*, 9 C.F.R. §§ 309.5(b), 309.7(b).

Any delay in the detection of certain diseases, such as foot and mouth disease (a type of vesicular disease), can be devastating. *See, e.g.*, Philip L. Paarlberg, et al., *Economic Impacts of Foreign Animal Disease*, USDA Economic Research Report Number 57, pp. 13, 27 (May 2008), *available at* http://www.ers.usda.gov/Publications/ERR57/ERR57.pdf (estimating the U.S. economic loss from a hypothetical foot and mouth disease outbreak as within the range of $2,773,000,000 to $4,062,000,000). And, as shown in Great Britain in 2001 and in South Korea during 2010-11, such outbreaks are far from merely hypothetical. *See* UK Department for Environment, Food and Rural Affairs (Defra), *Foot and Mouth Disease*

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The federal ante-mortem inspection regime thus protects both the animal industry and human health by preventing or limiting the spread of disease and keeping diseased animals out of the food supply, while at the same time allowing those animals passing inspection to be humanely used for the purpose for which they were raised, as food for human consumption.

II. CALIFORNIA PENAL CODE § 599f

In response to an incident involving the abuse of *cattle* at a federally-inspected slaughterhouse, in 2008 the State of California enacted an amendment to its Penal Code § 599f. 2008 Cal. Legis. Serv. ch. 194. Made applicable to *all* livestock and to be effective January 1, 2009, the amendment was enacted for the express purpose of superseding federal regulations concerning the handling and slaughter of nonambulatory livestock on federally-inspected slaughterhouse

premises.[5] According to the bill's primary sponsor, the bill was enacted because "California cannot allow unscrupulous slaughterhouse operators to endanger the safety of America's food supply and engage in grotesquely cruel practices." Assemblymember Paul Krekorian, *Krekorian Bill to Protect Meat Safety Signed Into Law by Governor*, Press Release (July 24, 2008) (C.A. App. 289); Assemblymember Paul Krekorian, *Assembly Third Reading AB 2098* (Apr. 23, 2008) (JA at 75) ("[D]ue to the well-documented failings of the USDA inspection system, there is still no adequate system in place to prevent downed animals from continuing to enter our food supply. That is largely due to the fact that California law does not specifically prohibit the processing and sale of meat from non-ambulatory animals for human consumption. . . ."). Respondent Humane Society of the United States, which has described itself as a "major proponent" of § 599f, Proposed Intervenor-Def. Mem. in Supp. of

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[5] The prior version of 599f was materially different in that it exempted federally-inspected slaughterhouses from the prohibitions on the purchase, receipt, and sale of nonambulatory animals, and contained no prohibition on processing, butchering, or sale of meat or meat products from those animals. Cal. Penal Code §§ 599f, 599f(a) (West 1995). The new law expressly prohibits federally-inspected slaughterhouses from engaging in these activities. Cal. Penal Code § 599f(a)-(b). Although the prior version required nonambulatory animals on slaughterhouse premises be immediately euthanized, Cal. Penal Code § 599f(b) (West 1995), the State did not enforce that provision against federally-inspected establishments, U.S. Amicus Br. on Pet. for Writ of Certiorari 6.

Mot. to Intervene at 7 (JA 2), made similar statements about the legislation's purpose.[9]

Under the resulting law, all slaughterhouses are barred from receiving, processing, butchering, or selling the meat of nonambulatory livestock of any kind for human consumption; the holding of any animal which is or becomes nonambulatory without immediately euthanizing it is a criminal act. Cal. Penal Code §§ 599f(a)-(c). Indeed, all violations of the California statute are criminal acts, punishable by imprisonment of up to one year or a fine of up to $20,000, or both. Cal. Penal Code § 599f(h). The full text of California Penal Code § 599f, as amended, is reproduced in Appendix A to this brief.

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[9] *See* Press Release, Humane Society of the United States, *Gov. Schwarzenegger Signs Law Strengthening Calif. Protection for Downed Cows* (Jul. 22, 2008), *available at* http://www.humanesociety.org/news/press_releases/2008/07/schwarzenegger_signs_law_protecting_california_downed_cows_072208.html ("The Humane Society of the United States' shocking investigation brought to light abuses that compelled lawmakers to step up enforcement of the state's no-downer law. . . . We hope that Congress and the Department of Agriculture enact similar strong protections for the rest of the country."); Nancy Perry (Vice President, HSUS) and Peter Brandt (Staff Attorney, HSUS), Commentary, *A Case Study on Cruelty to Farm Animals: Lessons Learned From the Hallmark Meat Packing Case*, 106 Mich. L. Rev. First Impressions 117, 120 (2008), *available at* http://www.michiganlawreview.org/articles/a-case-study-on-cruelty-to-farm-animals-lessons-learned-from-the-hallmark-meat-packing-case ("The experience at Hallmark shows that the USDA's regulatory scheme is woefully inadequate in comparison with California's criminal animal cruelty laws. . . .").

The differences between the federal and state requirements are stark. As outlined above, federal law requires an ante-mortem inspection of all animals at reception, and provides that inspection may occur on the transport vehicle itself upon its arrival at a slaughterhouse. *See supra* pp. 6-9. California law prohibits slaughterhouses from receiving a nonambulatory animal altogether. Cal. Penal Code § 599f(a). Federal regulations require nonambulatory swine to be separated and held for ante-mortem inspection; if that inspection is passed, such animals may be slaughtered for human consumption. *See supra* pp. 9-10. California law forbids the holding of such animals and requires their immediate euthanization. Cal. Penal Code § 599f(c). Federal law provides that, if all required inspections are passed, a nonambulatory pig is suitable for slaughter and the meat from that animal may be sold as safe for human consumption. *See supra* pp. 9-10; *accord* 21 U.S.C. § 610(c). California law prohibits slaughterhouses from processing, butchering, or selling meat or meat products from nonambulatory animals for human consumption. Cal. Penal Code § 599f(b).

III. FEDERAL REJECTION OF THE CALIFORNIA REQUIREMENTS

The FSIS conducted its own review of the abuses identified at the California slaughterhouse which gave rise to the California law. Although the FSIS acknowledged that the events "highlighted a vulnerability in [the federal] inspection system," the FSIS determined

after study that a targeted, species-specific response was appropriate and issued a proposed rule banning only the slaughter of nonambulatory *cattle* for human consumption. Requirements for the Disposition of Cattle That Become Non-Ambulatory Disabled Following Ante-Mortem Inspection, 74 Fed. Reg. 11463, 11463 (Mar. 18, 2009). FSIS expressly considered the requirements and prohibitions encompassed in California's law and rejected "extend[ing] the ban to cover all [nonambulatory] livestock." *Id.* at 11464. Indeed, FSIS even rejected the "recommend[ation] that non-ambulatory disabled cattle be immediately euthanized" without further holding, observation and inspection. *Id.* For non-cattle livestock such as swine, previous federal requirements were left in place. The FSIS did, however, promulgate new rules providing for enhanced humane handling and slaughter procedures. *See* FSIS Directive 6900.2, Rev. 2 (Aug. 15, 2011) (eff. Sept. 15, 2011).

IV. THE PROCEEDINGS BELOW

After Section 599f was amended, but before the amendments became effective, NMA filed suit against the State of California, its Attorney General, and its Governor in the United States District Court for the Eastern District of California. NMA sought injunctive relief and a declaration barring the application of Section 599f to federally-inspected swine slaughterhouses located in the State of California on preemption, vagueness, and commerce clause grounds. The Humane Society of the United States and other

organizations instrumental in the passage of Section 599f intervened as defendants.

Observing that "Section 599f alters the process and methods for the receipt of animals, the determination of the animal as 'disabled' or 'nonambulatory,' and also alters the subsequent handling of the nonambulatory animal," the district court held that the California statute "impermissibly 'differs from' and is [in] 'addition to' the FMIA and is therefore preempted by such federal laws." Pet. App. 36a-37a, 40a. After concluding that NMA "is faced with an immediate threat of irreparable harm" based on the conflict between Section 599f and the FMIA and the threat of criminal penalties, *id.* at 48a, and finding that the balance of equities favored enjoining enforcement of the statute, *id.* at 52a, the district court granted NMA's motion for preliminary injunction, *id.* at 53a.

The Court of Appeals for the Ninth Circuit vacated the injunction. The Ninth Circuit held that this Court's decision in *Wyeth v. Levine,* 555 U.S. 555, ___, 129 S. Ct. 1187, 1194-95 n.3 (2009), mandated the invocation of a "presumption against preemption," which, according to the court, required it to interpret the FMIA's express preemption provision narrowly. Pet. App. 7a-8a. The Ninth Circuit then concluded that the FMIA did not expressly preempt Section 599f because, in the court's view, Section 599f did not address the "'premises, facilities [or] operations'" of federally-inspected slaughterhouses, but rather "the kind of animal that may be slaughtered." *Id.* at 9a.

Concluding that a nonambulatory hog was a "kind of animal," the court reasoned that "the FMIA establishes inspection procedures to ensure animals that are slaughtered are safe for human consumption, but this doesn't preclude states from banning the slaughter of certain kinds of animals altogether." *Id.* At the same time, the court recognized that "a state may go too far in regulating what 'kind of animal' may be slaughtered" if it "effectively establish[es] a parallel state meat-inspection system" by "styl[ing] new [inspection] standards as a regulation of the 'kind of animal' that may be slaughtered." *Id.* at 10a-11a. While it declined to "decide what limits the [FMIA's] express preemption provision places on such regulations," it held, with regard to § 599f, that "[t]here is no express preemption here." *Id.* at 11a.[10]

Accordingly, the Ninth Circuit vacated the preliminary injunction. Pet. App. 17a. Although it denied NMA's petition for rehearing, *id.* at 57a-59a, it stayed its mandate pending disposition of the petition for certiorari, *id.* at 54a-56a. As a result, the district

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[10] The court of appeals did conclude that § 599f(e), a humane handling requirement, likely was expressly preempted, but remanded for a determination of whether injunctive relief was appropriate. Pet. App. 15a-17a. It also reversed the district court's finding that Section 599f was likely impliedly preempted. Pet. App. 11a-15a. The issue of implied preemption is not currently before the Court.

court's preliminary injunction is maintained pending this Court's ruling.

SUMMARY OF THE ARGUMENT

The Federal Meat Inspection Act expressly preempts California's attempt to regulate the operations of federally-inspected swine slaughterhouses.

1. The FMIA's preemption provision shows the "clear and manifest" intent of Congress that federal law alone sets the standards for slaughterhouse operations. As this Court held in *Jones v. Rath Packing Co.*, 430 U.S. 519, 531 (1977), the text of that provision "dictates the result" here.

In relevant part, 21 U.S.C. § 678 provides:

> Requirements within the scope of this chapter with respect to premises, facilities, and operations of any establishments at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State. . . .

The "[r]equirements within the scope of this chapter" are the comprehensive inspection, slaughter, processing, sale, and humane handling provisions of the FMIA, 21 U.S.C. §§ 601-695, and the myriad federal regulations and agency directives issued pursuant thereto. They expressly include requirements regarding what federally-inspected slaughterhouses are to

do with nonambulatory animals, their carcasses, and their meat – requirements which the California law at issue purports to supersede.

Those federal requirements begin at the front gate and continue through the entirety of a slaughterhouse's operations, from receipt of animals through sale of their meat. Section 603(a) of the FMIA requires "examination and inspection of all amenable species before they shall be allowed to enter into any slaughtering . . . establishment." That "examination and inspection" is expressly designed to reveal "all amenable species found on such inspection to show symptoms of disease," *id.*, such as nonambulation. And Congress itself provided what should be done with such animals: They are first to be "set apart" and then "slaughtered separately." *Id.* Throughout, they must be "handled . . . in accordance with" the humane handling requirements of federal law. *Id.* § 603(b). After slaughter, their "carcasses . . . shall be subject to a careful examination and inspection," *id.* § 603(a), by federal inspectors applying federal requirements, *id.* § 604. If they pass, their meat is to be labeled "inspected and passed," *id.*, and that meat may then be sold in commerce for human consumption, *see id.* § 610(c). If they do not pass, their meat is labeled "inspected and condemned," *id.* § 604, and such meat may not be sold for human consumption, *id.* § 610(c).

Congress thus set forth, in the statute itself, an "elaborate system of inspection of animals before slaughter, and of carcasses after slaughter," all "with

a view to" regulate the sale of "meat . . . in interstate and foreign commerce." *Pittsburgh Melting*, 248 U.S. at 4-5. And Congress also explicitly provided who was to implement this scheme, requiring that it be "all as provided by the rules and regulations to be prescribed by the Secretary." 21 U.S.C. § 603(a). Those rules and regulations set out in careful detail how swine found to be nonambulatory upon their initial "examination and inspection" are to be humanely treated and carefully re-inspected, with slaughter and sale of their meat for human consumption if all inspections are passed, and with humane euthanization and condemnation of their carcasses if they are not.

Congress also made it very clear that this federal system was to set the exclusive standards for slaughterhouse operations, explicitly prohibiting states from imposing any requirements "in addition to, or different than" federal ones, and allowing only one exception – for recordkeeping – not at issue here. 21 U.S.C. § 678. Moreover, Congress clearly intended a strict interpretation of "in addition to, or different than," as this Court confirmed in *Rath Packing*. At issue there was a state law that only implicitly prohibited something that federal regulations permitted, but that still made the state law "different than" the federal law and resulted in the state law's preemption. *Rath Packing*, 430 U.S. at 531-32.

2. Despite the above, California's Penal Code § 599f purports to supersede federal law. Where federal law provides for the elaborate and careful system of ante-mortem inspection and re-inspection outlined

above, Section 599f makes criminal even the receipt of an animal found upon inspection to be nonambuatory. *Id.* § 599f(a). Animals that are nonambulatory upon receipt or which become nonambulatory on slaughterhouse premises may not be held for further inspections and must be immediately euthanized. *Id.* § 599f(c). And even if their meat would be found safe for human consumption by federal inspectors applying federal standards, it is a criminal offense for a slaughterhouse to follow federal law and sell it as such. *Id.* § 599f(b).

Because these provisions are "in addition to, or different than" the federal law outlined above, they are expressly preempted.

3. The concerns that motivated the court of appeals to hold otherwise do not apply. Whether or not courts should sometimes "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act," that assumption does not apply when preemption is "the clear and manifest purpose of Congress," as this Court held in *Rath Packing* is the case for the FMIA. 430 U.S. at 525, 530-32 (internal quotation omitted). The purpose of the assumption is only to "assur[e] that 'the federal-state balance' will not be disturbed *unintentionally* by Congress." *Id.* at 525 (citation omitted) (emphasis added). Here, Congress entered the field explicitly because it found the states' powers inadequate to accomplish the National interest, and it has regulated this field for over a century. It acted purposefully when it expressly preempted different or

additional state standards for federally-inspected slaughterhouse operations, and there is no room here for any presumption to the contrary.

The court of appeals' concern for state "ethical" or "moral" regulations regarding the "kind of animal" that may be slaughtered, Pet. App. 10a, was also misplaced. Nonambulation is a symptom of a possible disease or disabling condition, not a "kind of animal." It is, moreover, a mutable symptom, which especially for a pig may not occur until the animal is already on slaughterhouse grounds. Those facts not only confirm nonambulation is expressly covered by the FMIA, they distinguish it from other cases involving horsemeat bans or hypothetical ones involving non-free-range animals.

Congress intended the States to have a cooperative, but limited, role to play in certain areas, primarily outside of slaughterhouse premises. But it clearly intended them to have no role in imposing different or additional requirements with respect to slaughterhouse operations. Because California Penal Code § 599f imposes such requirements, it is expressly preempted, and this Court should so rule.

ARGUMENT

I. THE FMIA EXPRESSLY PREEMPTS STATE REGULATION OF FEDERALLY-INSPECTED SLAUGHTERHOUSES

The Supremacy Clause requires that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. Congress is thus empowered to preempt "any" state law. Assuming Congress is acting pursuant to its enumerated powers (and there is no doubt of that here), the only issue is its intent to preempt, "'the ultimate touchstone' in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). Where, as here, federal law "contains an express pre-emption clause, [the] 'task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)); *Chamber of Commerce of the United States v. Whiting*, 563 U.S. ___, 131 S. Ct. 1968, 1977 (2011) (same). This "[s]tatutory construction must begin with . . . the assumption that the ordinary meaning of th[e] [statutory] language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)).

Section 408 of the Federal Meat Inspection Act, 21 U.S.C. § 678, is the FMIA's express preemption provision, and as this Court has recognized in the past, it "dictates the result in th[is] controversy." *Jones v. Rath Packing*, 430 U.S. 519, 531 (1977). Quoted in full (with sentence numbers added), its three sentences provide :

> [1] Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. [2] Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes

> of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. [3] This chapter shall not preclude any State or Territory or the District of Columbia from making requirement [sic] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

The first sentence concerns the "premises, facilities and operations of any establishment" at which federal inspection is provided, and plainly prohibits State laws which are "in addition to, or different than" federal requirements, with only one exception (for certain recordkeeping). The second sentence concerns "marking, labeling, packaging, or ingredient requirements" and again says there may be no different or additional State laws, again with one exception (for concurrent policing of adulterated food outside of federally-inspected establishments). The third sentence allows for some State regulation of "other matters" not covered by the first two sentences.

Even before the terms themselves are parsed, Congress' choice of preemption structure thus makes one thing "clear and manifest": for federally regulated establishments, the intention is preemption, with stated exceptions.

A. Federal Law Sets the Sole Standards for Federally-Inspected Slaughterhouse Operations and Preempts State Laws "In Addition To, Or Different Than" the Federal Standards.

The first sentence of the FMIA's express preemption provision is at the heart of this case. Its plain terms reflect Congress' intent that the FMIA set the sole standards with respect to federally-inspected slaughterhouse operations. Because California Penal Code § 599f imposes "requirements" "with respect to" slaughterhouse "operations" that are "within the scope of [the FMIA]" but that are "in addition to, or different than" FMIA requirements, Section 599f is expressly preempted.

The "requirements" at issue are those "within the scope of this chapter," *i.e.*, the FMIA, codified at Title 21, Chapter 12 of the U.S. Code, 21 U.S.C. §§ 601-695. Those statutory provisions, and the regulations which implement them, set forth the FMIA's "elaborate system of inspection of animals before slaughter, and of carcasses after slaughter and of meat-food products, with a view to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products in interstate and foreign commerce." *Pittsburgh Melting*, 248 U.S. at 4-5. Moreover, upon Congress' enactment of the HMSA of 1978, Pub. L. No. 95-445, 92 Stat. 1069 (1978), the "scope of this chapter" was expanded to include humane handling requirements. *See* 21 U.S.C. § 603(b). The FMIA thus requires that all federally-inspected slaughterhouses

comply with the FMIA's inspection, *id.* § 610(a), slaughter, *id.*, processing, *id.*, humane handling, *id.* § 610(b), and sale provisions, *id.* § 610(c).

Requirements regarding what federally-inspected slaughterhouses are to do with nonambulatory animals, their carcasses, and their meat, are clearly within the scope of the FMIA. Section 603(a) is explicit:

> For the purpose of preventing the use in commerce of meat and meat food products which are adulterated, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all amenable species before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in commerce; and all amenable species found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other cattle, sheep, swine, goats, horses, mules, or other equines, and when so slaughtered the carcasses of said cattle, sheep, swine, goats, horses, mules, or other equines shall be subject to a careful examination and inspection, all as provided by the rules and regulations to be prescribed by the Secretary, as provided for in this subchapter.

An initial "examination and inspection" even "before" an animal is "allowed to enter into any

slaughtering . . . establishment," is required by the FMIA. That ante-mortem inspection is to find if any "amenable species [e.g., swine][11]" are "show[ing] symptoms of disease [e.g., are nonambulatory]." Any animals showing such symptoms are to be "set apart" and "slaughtered separately" so that their carcasses can be "subject to a careful examination and inspection." And Congress explicitly wanted the Secretary to be the one to say exactly how all that was to be done: "all as provided by the rules and regulations to be prescribed by the Secretary."

The point of the "careful examination and inspection" of the carcasses of the animals slaughtered after being "set apart" is to determine if their meat is or is not adulterated. *See* 21 U.S.C. § 604. That determination is to be made "by inspectors appointed [by the Secretary] for that purpose." *Id.* If they find the meat

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[11] The Meat Inspection Act, when enacted in both 1906 and 1907, called for the inspection of specific species of animals – "cattle, sheep, swine, and goats." 34 Stat. at 674; 34 Stat. at 1260. The 1967 Wholesome Meat Act then expanded the species within its coverage so as to also include "horses, mules, and other equines." § 12(a), 81 Stat. at 592. The FMIA was then amended in the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-97, § 798, 119 Stat. 2120, 2166 (2005) by "striking 'cattle, sheep, swine, goats, horses, mules, and other equines' each place it appears and inserting 'amenable species.'" The amendment then defined "amenable species" as including "those species subject to the provisions of" the FMIA prior to the amendment, and "any additional species of livestock that the Secretary considers appropriate." *Id.* (codified as amended at 21 U.S.C. § 601(w)).

is "not adulterated," it is to be labeled "Inspected and passed." *Id.* If they find it to be adulterated, it is to be labeled "Inspected and condemned." *Id.* Thus, it is the federal inspectors who determine if the meat is "adulterated" or not. Those inspectors are guided by the definition of the term in 21 U.S.C. § 601(m) and related regulations, 9 C.F.R. § 301.2, none of which disqualifies an animal's meat (except for cattle) solely on the basis of a previous condition of nonambulation, 9 C.F.R. §§ 309.2(b), 309.3(e). Thus, Congress wanted the determination of what is or is not adulterated to be made by federal inspectors, using federal guidelines.

Moreover, and as also spelled out by Congress, the purpose of the FMIA's various requirements is not just to inspect animals and meat, but to inspect them for their "use in commerce." 21 U.S.C. § 603(a); *see also, e.g., id.* § 602 (findings regarding meat in commerce); *id.* § 604 (stating that post-mortem inspections are "for the purposes hereinbefore set forth"). Accordingly, § 610 of the FMIA contains, in part, requirements regarding whether "with respect to any . . . swine . . . or any carcasses, parts of carcasses, meat or meat food products of any such animals," one may "sell . . . in commerce . . . articles required to be inspected under this subchapter." The "subchapter" referred to is Subchapter I of the FMIA, 21 U.S.C. §§ 601-625, so the inspection requirements referred to include the provisions of §§ 603 and 604 discussed above. Such "articles required to be inspected under this subchapter" may not be sold "unless they have

been so inspected and passed." *Id.* § 610(c)(2). Thus, § 610 completes the coverage, saying (among other things) that carcasses and meat from animals which have been inspected and passed for human consumption pursuant to §§ 603 and 604 inspections may be sold for that purpose.

What federally-inspected swine slaughterhouses are to do with nonambulatory animals, their carcasses, and their meat, is thus governed by "[r]equirements within the scope of" the FMIA. The same provisions also show that all these "requirements" are "with respect to" slaughterhouse "operations." The "operations" of a slaughterhouse are ordinarily understood as what a slaughterhouse "does," its "practical work," as opposed to what land it occupies or equipment it has (its "premises" and "facilities").[12] What a federally-inspected slaughterhouse "does," practically speaking, is receive, slaughter, process, and sell in commerce the meat of animals of amenable species for human consumption. How it "does" any of that is governed by requirements made under the FMIA.

This common sense, practical understanding of slaughterhouse operations is reflected throughout the provisions of the FMIA, such as those discussed

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[12] *See* Webster's Third New International Dictionary 1580 (1966) (defining "operation" as the "doing or performing of a practical work or of something involving practical application of principles or processes often experimentally or as part of a series of actions").

above. Indeed, even the sole exception allowed in § 678's first sentence, that for "recordkeeping and other requirements within the scope of section 642 of this title," reflects that understanding. Section 642, provides, in pertinent part:

> The following classes of persons, firms, and corporations shall keep such records as will fully and correctly disclose all transactions involved in their businesses; and all persons, firms, and corporations subject to such requirements shall, at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to their places of business and opportunity to examine the facilities, inventory, and records thereof, to copy all such records, and to take reasonable samples of their inventory upon payment of the fair market value therefor –
>
> (1) Any persons, firms, or corporations that engage, for commerce, in the business of slaughtering any cattle, sheep, swine, goats, horses, mules, or other equines, or preparing, freezing, packaging, or labeling any carcasses, or parts or products of carcasses, of any such animals, for use as human food or animal food. . . .

21 U.S.C. § 642. Section 642 thus requires firms to keep records that will "disclose all transactions involved in their businesses." Such records must be kept by any firms "that engage, for commerce, in the business of slaughtering . . . for use as human food."

Id. So records of slaughterhouse sales for use as human food are covered by § 642, reflecting the understanding of Congress that such sales (and their records) were part of slaughterhouse operations. If not, there would have been no need to except such recordkeeping requirements from the preemption of the first sentence of § 678 in order to allow them to be co-regulated by the States. And it would make no sense to regard "recordkeeping" of sales for human consumption as part of "operations," but not the "sales" themselves, which are the practical end of all the other work the slaughterhouse performs.[13]

Although the first sentence of § 678 controls this dispute, its second sentence underscores the first's preemptive scope. That second sentence uses identical language to preempt "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter . . . with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter." 21

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[13] Importantly, Congress only excepted the recordkeeping aspect, not the actual regulation of sales for human consumption. Section 642's requirements deal only with keeping records and allowing inspections of those records, *see* 21 U.S.C. § 642, and those are the only aspects of "operations" excepted from the preemption of the first sentence of § 678. The *expressio unius est exclusio alterius* canon of construction, *see, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001), underscores that *all other* aspects of slaughterhouse operations besides recordkeeping – such as receipt, inspection, slaughter, processing, humane handling, and sale – are *not* excepted from preemption.

U.S.C. § 678. And like the first sentence of § 678, the second also contains a single exception:

> . . . any State . . . may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States.

Id. Under this exception, Congress permits States to exercise some authority, alongside the Secretary of Agriculture, to prevent "adulterated" or "misbranded" meat from being distributed for human consumption. But that authority is strictly limited in two important respects: First, it is limited to "adulterated" or "misbranded" articles as specifically defined by Congress in the same 1967 Act in which the preemption provision was added. § 2, 81 Stat. at 584-87; *see* 21 U.S.C. § 601(m) (defining "adulterated"); 21 U.S.C. § 601(n) (defining "misbranded").[14] Second, the States' concurrent jurisdiction is further expressly limited to adulterated or misbranded articles that are "*outside* of such an establishment" (*i.e.*, a federally-inspected

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[14] Notably, these definitions make no reference to meat from nonambulatory animals, *see* 21 U.S.C. § 601(m), (n), thus foreclosing concurrent state jurisdiction in this area.

slaughterhouse). 21 U.S.C. § 678 (emphasis added). And the prohibition against regulating what goes on at the slaughterhouse is reiterated with regard to imported articles that are adulterated or misbranded; the States' concurrent jurisdiction is limited to such "articles which are *not* at" a federally-regulated slaughterhouse. *Id.* (emphasis added).

Finally, the third sentence of § 678 also sheds light on the preemptive scope of the first sentence. That third sentence allows some State regulation of matters within the scope of the FMIA, but only of "other matters" not included in either of the first two sentences. It thus underscores Congress' intent that any matter that is covered by the first two sentences may not be subjected to State requirements that are "in addition to, or different than" federal ones. And by expressly making that third sentence applicable only to "other matters," Congress further showed its intent that the existence of that third sentence should not influence interpretation of the preemptive scope of the first two.[15]

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[15] Given its explicit limitation to "other matters," the third sentence is far from a "general" saving clause. But even in interpreting preemption schemes that do have such general clauses, this Court has "not believe[d] Congress intended to undermine [a] carefully drawn statute through a general savings clause." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) (quoting *Int'l Paper Co. v. Oullette*, 479 U.S. 481, 494 (1987)).

That leaves only the question of how much leeway Congress meant to leave the States when it forbade any State requirements which are "in addition to, or different than" federal requirements with respect to slaughterhouse operations. And that question fairly answers itself. The breadth of the statutory provisions shows that Congress was declaring it wanted *uniform and comprehensive federal* regulation of slaughterhouse operations. Just as importantly, Congress explicitly said it wanted *the Secretary* to be the one to fill in the details by rules and regulations. *See, e.g.*, 21 U.S.C. § 603(a) ("all as provided by the rules and regulations to be prescribed by the Secretary"). And it expressly established that "regulation by the Secretary and cooperation by the States" was the appropriate means to accomplish the purposes of the FMIA. *Id.* § 602.

Against that background, Congress clearly intended a strict interpretation of "in addition to, or different than" for requirements within the first two sentences of § 678. And that is just what this Court confirmed in *Rath Packing*. At issue there was a state law that only implicitly prohibited something federal regulations permitted, but that still made the state law "different than" the federal law, resulting in its preemption:

> California's use of a statistical sampling process to determine the average net weight of a lot implicitly allows for variations from stated weight caused by unavoidable deviations in the manufacturing process. But

> California makes no allowance for loss of weight resulting from moisture loss during the course of good distribution practice. Thus, the state law's requirement that the label accurately state the net weight, with implicit allowance only for reasonable manufacturing variations is 'different than' the federal requirement, which permits manufacturing deviations and variations caused by moisture loss during good distribution practice. . . .
>
> We therefore conclude that . . . [the state requirements] are pre-empted by federal law.

430 U.S. at 531-32 (footnotes omitted). That properly strict interpretation of the language Congress chose for the second sentence of § 678 controls the meaning of the identical language Congress chose for the first sentence. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) ("Generally, 'identical words used in different parts of the same statute are . . . presumed to have the same meaning.'" (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005))).

B. Congress' Purposes in Enacting the FMIA and the 1967 Wholesome Meat Act Reinforce the Plain Meaning of the Preemption Provision's Terms.

The plain language of the FMIA's preemption provision "necessarily contains the best evidence of Congress' pre-emptive intent," *CSX Transp.*, 507 U.S.

at 664. That "clear and manifest" preemptive intent is reinforced when viewed in the broader context of the statute's "structure and purpose," *Rath Packing*, 430 U.S. at 525, and "the circumstances in which the current [preemption] language was adopted," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001).

Until the turn of the twentieth century, food and meat inspection had been traditionally regulated by the States. *See Rath Packing*, 430 U.S. at 525. When the federal government entered the field, it did so very intentionally and clearly conscious of what it was doing. Federal definitions of "adulterated" and "misbranded" food, for example, which are now found in the FMIA, 21 U.S.C. § 601(m)-(n), first appeared in the 1906 Food and Drugs Act. Ch. 3915, §§ 7-8, 34 Stat. 768, 769-71 (1906). That law was enacted "[f]or preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors." Pmbl., 34 Stat. at 768. It answered President Roosevelt's call in December 1905 for such legislation and, notably, passed the Senate over four "no" votes, all of whom objected on the basis that the bill was "purely and only an exercise of the police power, and therefore not within the power of the federal government." C.C. Regier, *The Struggles for Federal Food and Drugs Legislation*, 1 Law & Contemp. Probs. 3, 10-11 (1933-34) (quoting 40 Cong. Rec. 2760 (1906)). Similarly, the bill passed the House over one member's objection that "the bill from first to last, violates every principle of our government by proposing to go into

sumptuary legislation for the regulation of the table menu." *Id.* at 12 (quoting 40 Cong. Rec. 8955-56 (1906)). That legislation became law on June 30, 1906. *Id.*; 34 Stat. at 768. On the same day, the first Meat Inspection Act was also enacted. Regier, *supra*, at 15; 34 Stat. at 674.

The impetus for the first Meat Inspection Act was the firestorm created by publication of Upton Sinclair's *The Jungle* and its depiction of Chicago's meat-packing houses. Regier, *supra*, at 9, 12-13. In response, this law created a federal meat inspection regime "for the purpose of preventing the use in interstate or foreign commerce . . . of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food." 34 Stat. at 674. Indeed, from early on, this Court affirmed that one of the Act's "plain object[s]" was to "enable the officials of the government to systematize and render effective the process of inspection," *Lewis*, 235 U.S. at 286-87, and that it "provide[d] an elaborate system of inspection," *Pittsburgh Melting*, 248 U.S. at 4. But the Act did not cover intrastate processing of meat for intrastate sale and consumption.

After sixty years of federal involvement, in 1967 Congress was again called to respond to a public outcry, this time to a Pulitzer Prize-winning exposé documenting "shocking abuses in some segments of the non-regulated meat industry" that were still under state control. Nick Kotz, *Ask Tighter Law on Meat Inspection for Products Sold Within States*,

Des Moines Sunday Register (Jul. 16, 1967), at pp. 1, 4. Congress responded by expanding the FMIA's reach to include the intrastate meat industry,[16] based on the recognition that "Federal standards must be required of *all* meat and meat food products" rather than States' disparate or non-existent state inspection schemes. S. Rep. No. 90-799, at 2-3, *as reprinted in* 1967 U.S.C.C.A.N. at 2190-91 (emphasis added). It also enacted an express preemption provision, codified at 21 U.S.C. § 678, to make sure federal law governed in those areas where it determined only federal standards should control. *See* H.R. Rep. No. 90-653, at 27 ("Section 408 would exclude States ... from regulating operations at plants inspected under title I."); S. Rep. No. 90-799, at 18, *as reprinted in* 1967 U.S.C.C.A.N. at 2207 (same); H.R. Rep. No. 90-653, at 7 ("States would be prohibited from regulating federally inspected plants whose operations are governed by title I").

Congress thus clearly and manifestly intended to take over almost all aspects of this field of regulation, based on its finding that the States' police powers were inadequate to the task. Indeed, even where Congress left the States some room to exercise their powers with regard to solely intrastate food distribution, it mandated that States establish and enforce, within two years of the law's enactment

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[16] Congress' authority to do so was premised on its finding that the intrastate meat industry "substantially affect[s]" "interstate or foreign commerce." § 2, 81 Stat. at 588.

requirements at least equal to those imposed under title I and IV of this Act" for establishments where animals are slaughtered or prepared for human food "solely for distribution within such State." § 15, 81 Stat. at 596 (codified at 21 U.S.C. § 661(c)(1)). The Secretary of Agriculture was specifically given the authority to designate any State and any intrastate establishment failing to meet the required standards as being subject to the federal control of titles I and IV of the FMIA. *Id.*

The express preemption provision included in the Wholesome Meat Act fits cleanly and clearly within these purposes; it is the cornerstone of national uniformity. Congress determined that only federal standards could adequately protect meat and meat food products, given the documented conditions at state-inspected establishments. Congress thus made it clear that States could not intrude upon the FMIA's comprehensive standards for "premises, facilities and operations" at federally-inspected establishments, nor upon the "[m]arking, labeling, packaging, or ingredient requirements" for any products prepared at such establishments, by expressly preempting any state requirements "in addition to, or different than" the FMIA's requirements with respect to those establishments and products. 21 U.S.C. § 678. Congress did provide, through the partial "saving clause" of the preemption provision's third sentence, that in certain areas of federal and state cooperation such as solely intrastate establishments, States were not precluded from enacting their own requirements consistent with

the Act.[17] But even there, if a State fell short of its mandate to enact and enforce requirements "at least equal" to those in the FMIA for those intrastate establishments, the Secretary of Agriculture could again declare the State or establishment subject to title I and IV of the Act, in which case, under the first two parts of the preemption provision, federal standards would exclusively control.

It is against this understanding of § 678, based on the force of its plain language and informed by the context of the FMIA's structure and purpose, that the preemption of California Penal Code § 599f must be considered.

II. THE FMIA EXPRESSLY PREEMPTS CALIFORNIA PENAL CODE § 599f

As described in detail above, the FMIA establishes a comprehensive set of inspection and humane handling standards governing a federally-inspected slaughterhouse's "premises, facilities and operations." These federal standards are found not just in the FMIA itself, 21 U.S.C. §§ 601-695, but also in the corresponding federal regulations promulgated by the Department of Agriculture (USDA), specifically the Food Safety and Inspection Service (FSIS) branch of

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[17] States could also continue some regulation of slaughtering done at "retail stores and restaurants," which generally remained exempted from federal inspection under the 1967 Act. § 15, 81 Stat. at 596 (codified at 21 U.S.C. § 661(c)(2)).

that agency. 9 C.F.R. § 300 *et seq.*; *see Rath Packing*, 430 U.S. at 528-32 (considering federal regulations in FMIA preemption analysis); *accord Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 453 (2005) ("State-law requirements must also be measured against any relevant EPA regulations that give content to FIFRA's misbranding standards."); *id.* at 454-55 (Breyer, J., concurring). Because the requirements imposed on federally-inspected slaughterhouses by California Penal Code § 599f are "in addition to, or different than" these federal standards, they are expressly preempted by the FMIA.

A. The FMIA Preempts California's Prohibition on a Federally-Inspected Slaughterhouse's Receipt of Nonambulatory Animals.

Federal regulations make clear that a vehicle carrying livestock becomes part of the slaughterhouse's "premises" and "operations," and thus is subject to federal jurisdiction, at the moment the vehicle enters the slaughterhouse grounds. *See, e.g.*, FSIS Directive 6900.2, Rev. 2, Ch. II, I. ("Once a vehicle carrying livestock enters, or is in line to enter, an official slaughter establishment's premises, the vehicle is considered to be a part of that establishment's premises. The animals within that vehicle are to be handled in accordance with 9 CFR 313.2."); *see also* 9 C.F.R. § 302.3; FSIS Directive 6900.1, Rev. 1, Part I, VI.B; FSIS Directive 6900.2, Rev. 1, Part I, V.B. These rules are consistent with Congress' intent

that the FMIA apply "from the time the animal arrives at the slaughter plant," 124 Cong. Rec. 24580 (statement of Sen. Dole), and with § 603(a), which requires "an examination and inspection of all amenable species before they shall be allowed to enter into any slaughtering . . . establishment."

Section 599f(a)'s prohibition on the receipt of nonambulatory animals by a slaughterhouse differs from and adds to the requirements of the FMIA. Neither the Act, nor FSIS regulations or directives, prohibits the receipt of nonambulatory swine. To the contrary, they expressly contemplate that nonambulatory animals will be received and address how such animals should be handled and inspected. *See, e.g.*, 9 C.F.R. § 309.2(b); FSIS Directive 6900.1, Rev. 1, Part II, I.D.; FSIS Directive 6900.2, Rev. 2, Ch. 5, III.E. Moreover, because hogs can become nonambulatory during transit, an inspector's determination of a hog's condition is not made, as a practical matter, until the delivery vehicle enters a slaughterhouse's grounds, its doors are opened, and the animals are unloaded. That determination necessarily occurs after the animal is received at the slaughterhouse facility, and is made as part of the slaughterhouse's operations.[18]

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[18] In addition to prohibiting receipt of nonambulatory animals, Section 599f(a) also prohibits federally-regulated slaughterhouses from buying such animals. The acquisition of animals to slaughter for human consumption is, of course, part of the "operations" of a federally-inspected slaughterhouse, and the FMIA regulates that as well, confining the purchase of such animals to

(Continued on following page)

B. Section 599f's Requirements That Non-ambulatory Swine Not be Held, and Instead be Immediately Euthanized, Are Preempted by the FMIA.

California's ban on holding a nonambulatory animal, and its requirement that all nonambulatory animals be immediately euthanized, impose different and additional requirements on federally-inspected slaughterhouses and, as a result, are preempted by the FMIA. The FMIA expressly subjects all livestock entering slaughterhouse premises to ante-mortem inspection, 21 U.S.C. § 603(a), and requires nonambulatory swine to be separated, taken to a covered pen, and held for further inspection or treatment, *see, e.g.*, 9 C.F.R. §§ 313.2(d)(1), 313.1(c). Upon inspection,

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"amenable species" and requiring their inspection before entry into the slaughterhouse, "[f]or the purpose of preventing the use in commerce of meat and meat food products which are adulterated," 21 U.S.C. § 603(a), with "adulterated" defined in part as "consist[ing] in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food," or "in whole or in part, the product of an animal which has died otherwise than by slaughter," *id.* at § 601(m)(3)&(5). A State may not regulate which animals a slaughterhouse may purchase for slaughter in a way that is "in addition to, or different than" the "[r]equirements . . . with respect to . . . operations" the Secretary has established. *Id.* § 678. Thus, to the extent that purchase occurs upon receipt or, as is typical, after successful ante-mortem inspection, *see* http://www.regulations.gov/#!document Detail;D=FSIS-2010-0041-5036 (comments from M. Dopp to FSIS proposed petition for rulemaking, 76 Fed. Reg. at 6572), California's ban on the purchase of nonambulatory swine is preempted.

slaughterhouse personnel are required to classify the animals as "U.S. Suspects" or "U.S. Condemned." *See id.* §§ 309.2(b), 309.3. Nonambulatory hogs classified as "U.S. Suspects" and found to be safe by a federal inspector may be passed for slaughter and human consumption. *Id.* § 311.1(a). Hogs classified as "U.S. Condemned" must be humanely euthanized. *Id.* § 309.13(a); *id.* pt. 313.

California's prohibition on holding nonambulatory animals and its requirement that such animals be immediately euthanized are plainly "different than" and "in addition to" the federal requirements. Whereas the federal regulations require nonambulatory animals to be held for ante-mortem inspection and permit such animals to be passed for slaughter and human consumption, the California statute forbids the holding of nonambulatory animals and requires that they be immediately euthanized.

Those requirements plainly fall within the scope of the FMIA with respect to a slaughterhouse's "premises" and "operations." The FMIA governs every part of [the] establishment" where "meat food products [are] prepared for commerce," 21 U.S.C. § 606(a), and, as described above, expressly requires the inspection and humane handling of livestock on slaughterhouse premises. Moreover, the holding of a nonambulatory animal and the exercise of a federal inspector's judgment as to which animals are suitable for slaughter and human consumption are plainly actions that occur on the slaughterhouse's "premises" and are integral to its "operations." California's determination

that certain individual animals exhibiting a particular symptom (*i.e.*, nonambulation) cannot be held by a slaughterhouse for further inspection or treatment, or thereafter be passed for slaughter, is markedly different than the federal requirements.

C. California's Bans on the Processing, Butchering, and Sale of Meat for Human Consumption Are Expressly Preempted by the FMIA.

Finally, California's bans on the processing, butchering and sale of meat from nonambulatory animals are expressly preempted by the FMIA. The processing and butchering of meat lie at the heart of a slaughterhouse's "operations," and federal law both regulates such operations, 21 U.S.C. § 603(b), and expressly permits a federally-inspected slaughterhouse to process and butcher the meat from nonambulatory animals for human consumption as long as those animals have been adjudged by an inspector to be safe and unadulterated, *id.* §§ 603(a), 604. *See also id.* § 610(a)-(c).

The sale of meat from nonambulatory animals is also strictly regulated by federal requirements. Under the FMIA, federal inspectors are authorized to determine which individual animals (of an amenable species) are fit for slaughter and human consumption when a given animal presents with a symptom of a possible disease or disabling condition on the premises of a federally-inspected slaughterhouse. *See, e.g.*,

id. § 603(a) (ante-mortem inspection); *id.* § 604 (post-mortem inspection); 9 C.F.R. §§ 313.2(d)(1), 313.1(c), 309.2(b), 311.1(a). And the FMIA provides that meat which has undergone such inspections and been passed by such inspectors may then be sold for human consumption. 21 U.S.C. § 610(c)(2). Indeed, a federal inspector's judgment as to which individual hogs are fit to be sold for human consumption and which are not lies at the heart of the FMIA.

California's ban on the sale of meat or meat products solely because the pig from which it came was found to be nonambulatory upon its first inspection thus imposes a "requirement" that directly regulates a slaughterhouse's "operations" in a way that is "different than" federal law. Indeed, California's ban on sales was expressly intended to regulate slaughterhouse operations through economic pressure. *See* C.A. App. 289 (Section 599f was intended to "create an economic disincentive to [certain slaughterhouse] practices [regarding nonambulatory animals] by prohibiting the sale of any meat or products from such animals.") (stmt. of Assemblymember Krekorian).

A slaughterhouse's ability to sell the meat or meat products for human consumption from animals it has slaughtered and processed is integral to the "practical work" of a slaughterhouse's "operations." Indeed, federally-inspected slaughterhouses operate for the very purpose of selling their end products into the market for human food. Stated differently, the sale of meat for human food is the last "practical" step in a slaughterhouse's operations after that meat has

been found to be unadulterated pursuant to federal standards and approved by a federal inspector for human consumption. Because California's ban on an operational activity – sale – is intended to impose the State's own standards of humane treatment, wholesomeness, and food safety, it is a requirement within the scope of the FMIA and thus preempted.

* * *

In sum, federal regulations provide that federally-inspected slaughterhouses may receive, inspect, process, butcher and sell the meat from nonambulatory swine passed by federal inspectors. California law says that they may not do so, and thus is "in addition to, or different than" federal law. Accordingly, those provisions of Section 599f are expressly preempted.

III. NO OTHER CONCERNS TRUMP EXPRESS PREEMPTION

As this Court has observed, in comparison to other forms of preemption, "when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). Here, the plain terms of § 678, coupled with this Court's prior interpretation of that preemption provision in *Rath Packing*, should have resulted in a straightforward preemption analysis by the court of appeals. That court was led astray, however, by its concern with the "presumption against preemption" and its belief that this case was

analogous to the "horsemeat" cases decided by other courts. Neither concern should have given it pause.

A. The Presumption Against Preemption Has No Application Here.

Whatever role a general "presumption against preemption" may have to play in the interpretation of the preemption provisions of other statutes, it has none to play here. Courts sometimes "*start* with the assumption that the historic police powers of the States were not to be superseded by the Federal Act," but that is at most the start; this assumption falls away when preemption is "the clear and manifest purpose of Congress," as this Court held in *Rath Packing* was the case for the FMIA. 430 U.S. at 525, 530-32 (internal quotations omitted) (emphasis added). While Members of the Court have from time to time disagreed on this assumption's role as an interpretive tool, *compare, e.g., Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77 (2008) (majority opinion), *with id.* at 98-103 (Thomas, J., dissenting), this Court has stated with unanimity that if a statute "contains an express pre-emption clause," it is "'the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent,'" that ultimately controls. *Sprietsma*, 537 U.S. at 62-63 (Stevens, J., for a unanimous Court) (quoting *CSX Transp.*, 507 U.S. at 664). Thus, the presumption against preemption, even at its fullest force, is only applicable "when the text of a pre-emption clause is susceptible of more than one plausible reading." *PLIVA, Inc. v. Mensing*,

564 U.S. ___, 131 S. Ct. 2567, 2591 (2011) (Sotomayor, J., dissenting) (quoting *Altria*, 555 U.S. at 77 (quoting *Bates*, 544 U.S. at 449)).[19] Correspondingly, this Court has "not invoked the presumption against pre-emption, and think[s] it unnecessary to do so" when it is otherwise able to "giv[e] force to the plain terms" of a federal act. *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. ___, 129 S. Ct. 2710, 2720 (2009). Indeed, invoking the "'presumption against pre-emption' to determine the *scope* of pre-emption" is inappropriate when "the categorical words of [an express pre-emption provision]" pose "insurmountable" "textual obstacles to [a] strained interpretation" that would otherwise unduly narrow its preemptive force. *Engine Mfrs. Ass'n*, 541 U.S. at 256-57 (emphasis in original) (responding to sole dissent from otherwise unanimous opinion).

This Court has specifically held that the plain terms of the FMIA's preemption provision compel a similar finding here. Acknowledging the "assumption" by quoting it as stated in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), the *Rath Packing* Court noted its purpose was to "assur[e] that 'the federal-state balance' will not be disturbed *unintentionally* by Congress or unnecessarily by the courts." 430 U.S. at 525 (citation omitted) (emphasis added).

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[19] The Court's discussion of the presumption in *PLIVA* was primarily in the context of "impossibility" preemption. *See, e.g.*, 131 S. Ct. at 2579-80 (plurality opinion); *id.* at 2589-92 (Sotomayor, J., dissenting).

"But," said the Court, "when Congress has 'unmistakably . . . ordained,' that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id.* (citation omitted). Finding that "Section 408 of the FMIA, 21 U.S.C. § 678, prohibits the imposition of . . . 'requirements in addition to, or different than, those made under' the Act," *id.* at 530 (footnote omitted), the Court held that "[t]his explicit pre-emption provision dictates the result in the controversy," *id.* at 530-31. Because "the state law's requirement . . . is 'different than' the federal requirement, . . . [the state law provisions] are preempted by federal law." *Id.* at 532. Indeed, the *Rath Packing* Court explicitly rejected the "strained" attempt to give a "restrictive meaning" to the terms of the FMIA's preemption provision, saying it would "twist[ ] the [statute's] language beyond the breaking point" and improperly narrow its preemptive scope. *Rath Packing*, 430 U.S. at 532. Thus, in accord with *Rath Packing*, the plain language of 21 U.S.C. § 678 alone should have foreclosed the court of appeals' invocation of the presumption against preemption.

In any event, even when the plain wording of Congress contains an ambiguity such that "the presumption against pre-emption might give good reason to construe [a] phrase . . . in a pre-emption provision more narrowly, . . . such a construction is not

appropriate" when the broader context of the federal act and its legislative history dictate otherwise. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522-23 (1992); *accord Branch v. Smith*, 538 U.S. 254, 292 (2003) (Stevens, J., concurring) ("Canons of statutory construction – such as the . . . presumption against pre-emption – are often less reliable guides in the search for congressional intent than a page or two of history."). Indeed, it is necessary that the presumption give way in such circumstances, given that "any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.'" *Medtronic*, 518 U.S. at 485-86 (quoting *Cipollone*, 505 U.S. at 530 n.27) (emphasis in original). Here, as explained above, the express preemption provision was passed as part of an Act intended to expand and strengthen the scope of the federal government's control over the slaughtering industry by ensuring that uniform federal standards would govern the "premises, facilities, and operations" of interstate and intrastate establishments.

The Act's preemption provision arose in this context and embodies Congress' intention that federal standards must be at their fullest force and freest from disparate state interference at those establishments where federal meat inspection occurs. This was intentionally meant to prohibit not only state interference with inspections, but also any state requirements falling within the scope of those establishments' "operations" under the FMIA. This broader intent to insulate federally-inspected slaughterhouses

from state interference is embodied in the provision's language (covering all requirements "with respect to . . . operations" and not merely "inspections"), *see* 21 U.S.C. § 678, and reflects the legislative purpose, *see, e.g.*, H.R. Rep. No. 90-653, at 7 ("States would be prohibited from regulating federally inspected plants whose operations are governed by title I."). The authority of States to impose requirements in addition to, or different than – but still consistent with those in the FMIA was instead permitted by Congress to be exercised only outside federally-inspected establishments, or with regard to certain aspects of solely intrastate commerce. The state law here, however, being directly and specifically aimed at federally-inspected slaughterhouses, is trained upon the very place where Congress intended more than anywhere else that federal standards exclusively control. In this context, it is especially inappropriate to apply any presumption against preemption to the portion of the preemption provision at issue here. *See Altria*, 555 U.S. at 85 (explaining presumption against preemption not invoked in *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), when state requirement "involved precisely the type of state rule that Congress had intended to pre-empt").

Moreover, even taken on its own terms, the court of appeals' reasoning does not withstand analysis. It held that "Section 678 preempts state regulation of the 'premises, facilities and operations' of slaughterhouses, and section 599f(a)-(c) deals with none of these." Pet. App. 9a. That is a plainly inaccurate

description of what the state law does, as shown in Part II above. The court further justified its conclusion by explaining that the state law "doesn't require *any* additional or different inspections than does the FMIA, and is thus not a regulation of the 'premises, facilities and operations' of slaughterhouses." Pet. App. 11a (emphasis in original). That is primarily wrong in its conclusion (as shown, the state law clearly purports to regulate slaughterhouse operations), but it is also plainly inaccurate in its premise: nonambulation is always determined by a visual "inspection," and the FMIA's § 603(a) explicitly covers inspections for such possible "symptoms of disease," explicitly describes what is to be done with "all amenable species found on such inspection to show symptoms of disease," and explicitly leaves to the Secretary the prescription of implementing rules and regulations, all of which are very different from what the state law requires. The court of appeals also erred in concluding that "section 678 explicitly preserves for the states broad authority to regulate slaughterhouses." Pet. App. 8a. As shown above, by being explicit in permitting states to take "other action, consistent with this chapter, with respect to any *other* matters regulated under this chapter," Congress reinforced what States were *precluded* from doing – imposing requirements "in addition to, or different than" those "within the scope of this chapter with respect to premises, facilities and operations of any [federally-inspected] establishment." *See* 21 U.S.C. § 678 (emphasis added). The "*other* matters regulated under this chapter" on which states may act, include, for example, the intrastate meat industry if not made subject

to federal inspection by the Secretary of Agriculture, *id.* § 661(a)(1), (c)(1), or certain registration requirements of persons, firms, or corporations involved in the meat industry "as a meat broker, renderer, or animal food manufacturer," as well as certain wholesalers, warehousemen, and transporters, *id.* § 643.[20] They do not include federally-inspected slaughterhouse operations.

B. Nonambulation is a Symptom, Not a Kind of Animal.

The court of appeals also erred in analogizing the California law to state laws banning the slaughter of horses, proclaiming that the California law simply "regulates the kind of animal that may be slaughtered" and concluding that the FMIA "doesn't preclude states from banning the slaughter of certain kinds of animals altogether." Pet. App. 9a. Whether that ultimate conclusion is correct need not concern the Court here. Nonambulation is a symptom of a transitory condition (such as stress or fatigue) or of a possible disease, not a "kind of animal." It is thus wholly unlike all the examples of "kinds of animals" the court of appeals thought could be banned from

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[20] The States also retain authority over slaughterhouses for matters outside of the purview of the FMIA, but that is not because of the saving clause. Because 21 U.S.C. § 678 is focused specifically upon what is "within the scope of," and "regulated under this chapter," *i.e.*, the FMIA, state regulation in areas such as state building codes, workplace safety requirements, and general criminal laws are outside the scope of § 678 altogether, *including* its saving clause.

slaughter under state law, Pet. App. 10a, as well as the horse slaughter bans at issue in *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007), *cert. denied*, 554 U.S. 902 (2008), and *Empacadora de Carnes de Fresnillo v. Curry*, 476 F.3d 326 (5th Cir.), *cert. denied*, 550 U.S. 957 (2007), on which the court of appeals relied. Pet. App. 9a. As a symptom, nonambulation is expressly covered by the inspection and subsequent handling requirements of 21 U.S.C. § 603(a) and its implementing regulations, as discussed above. The FMIA explicitly leaves to the Secretary's regulations and the judgment of federal inspectors the decision of what to do with animals of "amenable species" showing such "symptoms" that show up at the front door of a slaughterhouse. Being a horse, or a free-range farm animal, is not a "symptom," and that is a textual distinction that separates those examples from "nonambulatory."

There is also an important practical distinction between the mutable symptom of becoming "nonambulatory," and the "condition" of being a horse or a grass-fed cow: Becoming nonambulatory may first occur *on* the federal premises (or on the truck on the way there), and is detected and addressed as part of the federal inspection process. Horses, or non-grass-fed or non-free-range livestock, can simply be kept off the slaughterhouse premises, as well as off the trucks transporting those animals. By contrast, when pigs walk themselves onto a truck, it is not known until that truck arrives at the slaughterhouse and the truck's doors are opened whether any animals have

become unable to leave the truck on their own. That the truck must be on slaughterhouse grounds before it is known which animals became unable to stand or walk while in transit is fully recognized and provided for by the FMIA's requirements, and that fact brings the preemptive force of the FMIA directly to bear on Section 599f(a).

Once again, the reasoning of the court of appeals also fails on its own terms. It recognized that a state might "go too far in regulating what 'kind of animal' may be slaughtered" if the state thought federal standards were too lax and tried to set its own disease standards by calling animals with certain symptoms (set by the state) a "kind of animal." Pet. App. 10a-11a. But it failed to recognize that is exactly what California has done here.

C. Congress Consciously Limited the States' Role.

Finally, that § 678 expressly preempts the California state law at issue does not mean States have no role to play. What federal law requires, however, is that States must act through the federal processes provided. Congress was sensitive to this in enacting the Wholesome Meat Act of 1967, which, in addition to mandating uniform federal standards, also provided for "cooperation with appropriate State agencies with respect to State meat inspection programs." Pmbl., 81 Stat. at 584. The cornerstone of this cooperative effort was to permit the Secretary to

work collaboratively with States in developing their own *intra*state inspection programs "at least equal to those under title I," as well as certain other State programs with requirements "at least equal to those provided in title II" of the FMIA, § 15, 81 Stat. at 595 (codified at 21 U.S.C. § 661(a)(1)-(2)), so long as they were "consistent" with the FMIA and did not run afoul of Congress' express preemption provisions.

California, however, has not acted through the federal processes mandated by the FMIA. First, like several other states, California completely abandoned its own intrastate meat inspection system in 1976. *See* 9 C.F.R. § 331.2. Second, while abandoning the very intrastate inspection program it was allowed to maintain, the State's amendment of Section 599f was specifically aimed at forcing federally-inspected slaughterhouses to alter their handling and slaughter of livestock, *see supra*, pp. 14-17, the very area where Congress expressly stated federal standards are to be absolute, *see* 21 U.S.C. § 678.

Moreover, beyond the possible federal and state cooperation specifically detailed in the FMIA, 21 U.S.C. § 661, States are also not foreclosed from trying to shape federal policy in Congress and the USDA. Indeed, the USDA has been very active in addressing concerns surrounding nonambulatory livestock. For example, the USDA solicited and received approximately 58,000 comments, including from a state department of agriculture, in response to its proposed rule, now in effect, requiring that all nonambulatory disabled cattle be condemned. 74 Fed.

Reg. 11463. Moreover, in December 2010, the USDA announced it would be responding to and soliciting comments on two petitions for rulemaking seeking to change the federal rules for the slaughter of nonambulatory livestock other than cattle, as well as other measures. News Release, FSIS, *USDA Announces Measures to Improve Humane Handling Enforcement* (Dec. 22, 2010) *available at* http://www.fsis.usda.gov/News/NR_122210_01/index.asp; 76 Fed. Reg. 6572 (Feb. 7, 2011)[21] Although the State of California was welcome to participate in this proposed rulemaking process, it has apparently declined to do so.[22]

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[21] Neither of these petitions, if they became rules, however, would moot the suit here. The Humane Society of the United States' petition solely concerns nonambulatory disabled veal calves, and thus has no bearing on this case, which is specific to swine. 76 Fed. Reg. at 6573. Although the petition brought by Farm Sanctuary is broader, seeking to "amend the ante-mortem inspection regulations" so as to require that all nonambulatory disabled livestock, including swine, be condemned and humanely euthanized, 76 Fed. Reg. at 6574, that regulation would still, as the United States has recognized, U.S. Amicus Br. on Pet. for Writ of Certiorari 17 n.5, be at odds with Cal. Penal Code § 599f's do-not-receive, do-not-hold, and immediately euthanize requirements, and also its prohibition of the sale of all meat from animals merely "unable to stand and walk without assistance," rather than those that are "non-ambulatory *disabled*" as provided for in the federal regulations, *see* 9 C.F.R. § 309.2(b).

[22] Comments on the proposed petitions for rulemaking were due by April 8, 2011. 76 Fed. Reg. at 6572. According to the Government's website, 5,164 public submissions were received, Regulations.gov, Docket FSIS-2010-0041, *available at* http://www.regulations.gov/#!docketDetail;dct=PS;rpp=250;po=0;D=FSIS-2010-0041, including comments from NMA, *id.*, *available at* http://www.regulations.gov/#!documentDetail;D=FSIS-2010-0041-5119, and the

(Continued on following page)

In any event, ultimately, Congress has determined that the "appropriate" means to "effectively regulate . . . commerce" in "all articles and animals which are regulated under" the FMIA, and to "protect the health and welfare of consumers," is "regulation by the Secretary and cooperation by the States." 21 U.S.C. § 602. Because California Penal Code § 599f is "in addition to, or different than" that federal regulation, it is expressly preempted.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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American Meat Institute, *id.*, *available at* http://www.regulations.gov/#!documentDetail;D=FSIS-2010-0041-5036. No corresponding comments from the State of California are found at that site.

APPENDIX A

California Penal Code § 599f. Nonambulatory animals; slaughterhouses, stockyards, auctions, market agencies, or dealers; transactions; processing; euthanasia; movement; violations

(a) No slaughterhouse, stockyard, auction, market agency, or dealer shall buy, sell, or receive a nonambulatory animal.

(b) No slaughterhouse shall process, butcher, or sell meat or products of nonambulatory animals for human consumption.

(c) No slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.

(d) No stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

(e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

(f) No person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

(g) No person shall accept a nonambulatory animal for transport or delivery to a slaughterhouse, stockyard, auction, market agency, or dealer.

(h) A violation of this section is subject to imprisonment in a county jail for a period not to exceed one year, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and imprisonment.

(i) As used in this section, "nonambulatory" means unable to stand and walk without assistance.

(j) As used in this section, "animal" means live cattle, swine, sheep, or goats.

(k) As used in this section, "humanely euthanize" means to kill by a mechanical, chemical, or electrical method that rapidly and effectively renders the animal insensitive to pain.

APPENDIX B

The Federal Meat Inspection Act, 21 U.S.C. § 601, *et. seq.*, provides in relevant part:

§ 601. Definitions

As specified in this chapter, except as otherwise specified, the following terms shall have the meanings stated below:

* * *

(m) The term "adulterated" shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

(1) if it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance, such article shall not be considered adulterated under this clause if the quantity of such substance in or on such article does not ordinarily render it injurious to health;

(2)(A) if it bears or contains (by reason of administration of any substance to the live animal or otherwise) any added poisonous or added deleterious substance (other than one which is (i) a pesticide chemical in or on a raw agricultural commodity; (ii) a food additive; or (iii) a color additive) which may, in the judgment of the Secretary, make such article unfit for human food;

(B) if it is, in whole or in part, a raw agricultural commodity and such commodity bears or contains a pesticide chemical which is unsafe within the meaning of section 346a of this title,

(C) if it bears or contains any food additive which is unsafe within the meaning of section 348 of this title,

(D) if it bears or contains any color additive which is unsafe within the meaning of section 379e of this title: *Provided*, That an article which is not adulterated under clause (B), (C), or (D) shall nevertheless be deemed adulterated if use of the pesticide chemical, food additive, or color additive in or on such article is prohibited by regulations of the Secretary in establishments at which inspection is maintained under this subchapter;

(3) if it consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food;

(4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;

(5) if it is, in whole or in part, the product of an animal which has died otherwise than by slaughter;

(6) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health;

(7) if it has been intentionally subjected to radiation, unless the use of the radiation was in conformity with a regulation or exemption in effect pursuant to section 348 of this title;

(8) if any valuable constituent has been in whole or in part omitted or abstracted therefrom; or if any substance has been substituted, wholly or in part therefor; or if damage or inferiority has been concealed in any manner; or if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is; or

(9) if it is margarine containing animal fat and any of the raw material used therein consisted in whole or in part of any filthy, putrid, or decomposed substance.

* * *

(w) The term "amenable species" means –

(1) those species subject to the provisions of this chapter on the day before November 10, 2005;

(2) catfish, as defined by the Secretary; and

(3) any additional species of livestock that the Secretary considers appropriate.

§ 602. Congressional statement of findings

Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to

effectively regulate such commerce, and to protect the health and welfare of consumers.

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§ 603. Inspection of meat and meat food products

(a) Examination of animals before slaughtering; diseased animals slaughtered separately and carcasses examined

For the purpose of preventing the use in commerce of meat and meat food products which are adulterated, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all amenable species before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in commerce; and all amenable species found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other cattle, sheep, swine, goats, horses, mules, or other equines, and when so slaughtered the carcasses of said cattle, sheep, swine, goats, horses, mules, or other equines shall be subject to a careful examination and inspection, all as provided by the rules and regulations to be prescribed by the Secretary, as provided for in this subchapter.

(b) Humane methods of slaughter

For the purpose of preventing the inhumane slaughtering of livestock, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of the method by which amenable species are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under this chapter. The Secretary may refuse to provide inspection to a new slaughtering establishment or may cause inspection to be temporarily suspended at a slaughtering establishment if the Secretary finds that any cattle, sheep, swine, goats, horses, mules, or other equines have been slaughtered or handled in connection with slaughter at such establishment by any method not in accordance with the Act of August 27, 1958 (72 Stat. 862; 7 U.S.C. 1901-1906) until the establishment furnishes assurances satisfactory to the Secretary that all slaughtering and handling in connection with slaughter of livestock shall be in accordance with such a method.

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§ 604. Post mortem examination of carcasses and marking or labeling; destruction of carcasses condemned; reinspection

For the purposes hereinbefore set forth the Secretary shall cause to be made by inspectors appointed for that purpose a post mortem examination and inspection of the carcasses and parts thereof of all amenable species to be prepared at any slaughtering,

meat-canning, salting, packing, rendering, or similar establishment in any State, Territory, or the District of Columbia as articles of commerce which are capable of use as human food; and the carcasses and parts thereof of all such animals found to be not adulterated shall be marked, stamped, tagged, or labeled as "Inspected and passed"; and said inspectors shall label, mark, stamp, or tag as "Inspected and condemned" all carcasses and parts thereof of animals found to be adulterated; and all carcasses and parts thereof thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary may remove inspectors from any such establishment which fails to so destroy any such condemned carcass or part thereof, and said inspectors, after said first inspection, shall, when they deem it necessary, re-inspect said carcasses or parts thereof to determine whether since the first inspection the same have become adulterated, and if any carcass or any part thereof shall, upon examination and inspection subsequent to the first examination and inspection, be found to be adulterated, it shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary may remove inspectors from any establishment which fails to so destroy any such condemned carcass or part thereof.

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§ 606. Inspection and labeling of meat food products

(a) In general

For the purposes hereinbefore set forth the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and for the purposes of any examination and inspection and inspectors shall have access at all times, by day or night, whether the establishment be operated or not, to every part of said establishment; and said inspectors shall mark, stamp, tag, or label as "Inspected and passed" all such products found to be not adulterated; and said inspectors shall label, mark, stamp, or tag as "Inspected and condemned" all such products found adulterated, and all such condemned meat food products shall be destroyed for food purposes, as hereinbefore provided, and the Secretary may remove inspectors from any establishment which fails to so destroy such condemned meat food products: *Provided*, That subject to the rules and regulations of the Secretary the provisions of this section in regard to preservatives shall not apply to meat food products for export to any foreign country and which are prepared or packed according to the specifications or directions of the foreign purchaser, when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is to be exported; but if said article

shall be in fact sold or offered for sale for domestic use or consumption then this proviso shall not exempt said article from the operation of all the other provisions of this chapter.

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§ 610. Prohibited acts

No person, firm, or corporation shall, with respect to any cattle, sheep, swine, goats, horses, mules, or other equines, or any carcasses, parts of carcasses, meat or meat food products of any such animals –

(a) Slaughtering animals or preparation of articles capable of use as human food

slaughter any such animals or prepare any such articles which are capable of use as human food at any establishment preparing any such articles for commerce, except in compliance with the requirements of this chapter;

(b) Humane methods of slaughter

slaughter or handle in connection with slaughter any such animals in any manner not in accordance with the Act of August 27, 1958 (72 Stat. 862; 7 U.S.C. 1901-1906);

(c) Sales, transportation, and other transactions

sell, transport, offer for sale or transportation, or receive for transportation, in commerce, (1) any such articles which (A) are capable of use as human food and (B) are adulterated or misbranded at the time of such sale, transportation, offer for sale or transportation, or receipt for transportation; or (2) any articles required to be inspected under this subchapter unless they have been so inspected and passed;

(d) Adulteration or misbranding

do, with respect to any such articles which are capable of use as human food, any act while they are being transported in commerce or held for sale after such transportation, which is intended to cause or has the effect of causing such articles to be adulterated or misbranded.

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§ 642. Recordkeeping requirements

(a) Classes of persons bound; scope of disclosure; access to places of business; examination of records, facilities, and inventories; copies; samples

The following classes of persons, firms, and corporations shall keep such records as will fully and correctly disclose all transactions involved in their businesses; and all persons, firms, and corporations subject to such requirements shall, at all reasonable

times upon notice by a duly authorized representative of the Secretary, afford such representative access to their places of business and opportunity to examine the facilities, inventory, and records thereof, to copy all such records, and to take reasonable samples of their inventory upon payment of the fair market value therefor –

(1) Any persons, firms, or corporations that engage, for commerce, in the business of slaughtering any cattle, sheep, swine, goats, horses, mules, or other equines, or preparing, freezing, packaging, or labeling any carcasses, or parts or products of carcasses, of any such animals, for use as human food or animal food;

(2) Any persons, firms, or corporations that engage in the business of buying or selling (as meat brokers, wholesalers or otherwise), or transporting in commerce, or storing in or for commerce, or importing, any carcasses, or parts or products of carcasses, of any such animals;

(3) Any persons, firms, or corporations that engage in business, in or for commerce, as renderers, or engage in the business of buying, selling, or transporting, in commerce, or importing, any dead, dying, disabled, or diseased cattle, sheep, swine, goats, horses, mules, or other equines, or parts of the carcasses of any such animals that died otherwise than by slaughter.

(b) Period of maintenance

Any record required to be maintained by this section shall be maintained for such period of time as the Secretary may by regulations prescribe.

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§ 643. Registration of business, name of person, and trade names

No person, firm, or corporation shall engage in business, in or for commerce, as a meat broker, renderer, or animal food manufacturer, or engage in business in commerce as a wholesaler of any carcasses, or parts or products of the carcasses, of any cattle, sheep, swine, goats, horses, mules, or other equines, whether intended for human food or other purposes, or engage in business as a public warehouseman storing any such articles in or for commerce, or engage in the business of buying, selling, or transporting in commerce, or importing, any dead, dying, disabled, or diseased animals of the specified kinds, or parts of the carcasses of any such animals that died otherwise than by slaughter, unless, when required by regulations of the Secretary, he has registered with the Secretary his name, and the address of each place of business at which, and all trade names under which, he conducts such business.

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§ 661. Federal and State cooperation

(a) Congressional statement of policy

It is the policy of the Congress to protect the consuming public from meat and meat food products that are adulterated or misbranded and to assist the efforts by State and other Government agencies to accomplish this objective. In furtherance of this policy –

(1) Development and administration of State meat inspection program equal to subchapter I ante and post mortem inspection, reinspection, and sanitation requirements

The Secretary is authorized, whenever he determines that it would effectuate the purposes of this chapter, to cooperate with the appropriate State agency in developing and administering a State meat inspection program in any State which has enacted a State meat inspection law that imposes mandatory ante mortem and post mortem inspection, reinspection and sanitation requirements that are at least equal to those under subchapter I of this chapter, with respect to all or certain classes of persons engaged in the State in slaughtering cattle, sheep, swine, goats, or equines, or preparing the carcasses, parts thereof, meat or meat food products, of any such animals for use as human food solely for distribution within such State.

* * *

(c) State meat inspection requirements

(1) Notice to Governor of nondevelopment or nonenforcement; designation of State as subject to subchapters I and IV; delay and revocation of designation; publication in Federal Register; notice of production of adulterated meat or meat food products; designation of State

If the Secretary has reason to believe, by thirty days prior to the expiration of two years after December 15, 1967, that a State has failed to develop or is not enforcing, with respect to all establishments within its jurisdiction (except those that would be exempted from federal inspection under subparagraph (2)) at which cattle, sheep, swine, goats, or equines are slaughtered, or their carcasses, or parts or products thereof, are prepared for use as human food, solely for distribution within such State, and the products of such establishments, requirements at least equal to those imposed under subchapter I and IV of this chapter, he shall promptly notify the Governor of the State of this fact. If the Secretary determines, after consultation with the Governor of the State, or representative selected by him, that such requirements have not been developed and activated, he shall promptly after the expiration of such two-year period designate such State as one in which the provisions of subchapters I and IV of this chapter shall apply to operations and transactions wholly within such State: *Provided*, That if the Secretary has reason to believe that the State will activate such

requirements within one additional year, he may delay such designation for said period, and not designate the State, if he determines at the end of the year that the State then has such requirements in effective operation. The Secretary shall publish any such designation in the Federal Register and, upon the expiration of thirty days after such publication, the provisions of subchapters I and IV shall apply to operations and transactions and to persons, firms, and corporations engaged therein in the State to the same extent and in the same manner as if such operations and transactions were conducted in or for commerce. Thereafter, upon request of the Governor, the Secretary shall revoke such designation if the Secretary determines that such State has developed and will enforce requirements at least equal to those imposed under subchapter I and subchapter IV of this chapter: *And provided further*, That, notwithstanding any other provision of this section, if the Secretary determines that any establishment within a State is producing adulterated meat or meat food products for distribution within such State which would clearly endanger the public health he shall notify the Governor of the State and the appropriate Advisory Committee provided by section 661 of this title of such fact for effective action under State or local law. If the State does not take action to prevent such endangering of the public health within a reasonable time after such notice, as determined by the Secretary, in light of the risk to public health, the Secretary may forthwith designate any such establishment as subject to the provisions of subchapters I and IV of

this chapter, and thereupon the establishment and operator thereof shall be subject to such provisions as though engaged in commerce until such time as the Secretary determines that such State has developed and will enforce requirements at least equal to those imposed under subchapter I and subchapter IV of this chapter.

(2) Exemptions of retail stores, restaurants, and similar retail-type establishments; operations conducted at a restaurant central kitchen facility

The provisions of this chapter requiring inspection of the slaughter of animals and the preparation of carcasses, parts thereof, meat and meat food products shall not apply to operations of types traditionally and usually conducted at retail stores and restaurants, when conducted at any retail store or restaurant or similar retail-type establishment for sale in normal retail quantities or service of such articles to consumers at such establishments if such establishments are subject to such inspection provisions only under this paragraph (c). For the purposes of this subparagraph, operations conducted at a restaurant central kitchen facility shall be considered as being conducted at a restaurant if the restaurant central kitchen prepares meat or meat food products that are ready to eat when they leave such facility and are served in meals or as entrees only to customers at restaurants owned or operated by the same person, firm, or corporation owning or operating such facility:

Provided, That such facility shall be subject to the provisions of section 642 of this title: *Provided further*, That the facility may be subject to the inspection requirements under subchapter I of this chapter for as long as the Secretary deems necessary, if the Secretary determines that the sanitary conditions or practices of the facility or the processing procedures or methods at the facility are such that any of its meat or meat food products are rendered adulterated.

* * *

§ 678. Non-Federal jurisdiction of federally regulated matters; prohibition of additional or different requirements for establishments with inspection services and as to marking, labeling, packaging, and ingredients; recordkeeping and related requirements; concurrent jurisdiction over distribution for human food purposes of adulterated or misbranded and imported articles; other matters

Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those

made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

APPENDIX C

The federal regulations from the Food Safety and Inspection Service, Department of Agriculture, 9 C.F.R. § 300, *et. seq.*, provide in relevant part:

9 C.F.R. § 301.2 Definitions.

As used in this subchapter, unless otherwise required by the context, the following terms shall be construed, respectively, to mean:

* * *

Adulterated. This term applies to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

(1) If it bears or contains any such poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance, such article shall not be considered adulterated under this clause if the quantity of such substance does not ordinarily render it injurious to health;

(2)(i) If it bears or contains (by reason of administration of any substance to the live animal or otherwise) any added poisonous or added deleterious substance (other than one which is:

(A) A pesticide chemical in or on a raw agricultural commodity;

(B) A food additive; or

(C) A color additive) which may, in the judgment of the Administrator, make such article unfit for human food;

(ii) If it is, in whole or in part, a raw agricultural commodity and such commodity bears or contains a pesticide chemical which is unsafe within the meaning of section 408 of the Federal Food, Drug, and Cosmetic Act;

(iii) If it bears or contains any food additive which is unsafe within the meaning of section 409 of the Federal Food, Drug, and Cosmetic Act;

(iv) If it bears or contains any color additive which is unsafe within the meaning of section 706 of the Federal Food, Drug, and Cosmetic Act: *Provided*, That an article which is not deemed adulterated under paragraphs (aa)(2) (ii), (iii), or (iv) of this section shall nevertheless be deemed adulterated if use of the pesticide chemical, food additive, or color additive in or on such article is prohibited by the regulations in this subchapter in official establishments;

(3) If it consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food;

(4) If it has been prepared, packed, or held under unsanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;

(5) If it is, in whole or in part, the product of an animal which has died otherwise than by slaughter;

(6) If its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health;

(7) If it has been intentionally subjected to radiation, unless the use of the radiation was in conformity with a regulation or exemption in effect pursuant to section 409 of the Federal Food, Drug, and Cosmetic Act;

(8) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or if any substance has been substituted, wholly or in part therefor; or if damage or inferiority has been concealed in any manner; or if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is; or

(9) If it is margarine containing animal fat and any of the raw material used therein consisted in whole or in part of any filthy, putrid, or decomposed substance, or is otherwise adulterated.

* * *

9 C.F.R. § 302.3 Livestock and products entering official establishments.

All livestock and all products entering any official establishment and all products prepared, in whole or in part, therein, shall be inspected, handled, stored, prepared, packaged, marked, and labeled as required by the regulations in this subchapter.

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9 C.F.R. § 309.1 Ante-mortem inspection in pens of official establishments.

(a) All livestock offered for slaughter in an official establishment shall be examined and inspected on the day of and before slaughter unless, because of unusual circumstances, prior arrangements acceptable to the Administrator have been made in specific cases by the circuit supervisor for such examination and inspection to be made on a different day before slaughter.

(b) Such ante-mortem inspection shall be made in pens on the premises of the establishment at which the livestock are offered for slaughter before the livestock shall be allowed to enter into any department of the establishment where they are to be slaughtered or dressed or in which edible products are handled. When the holding pens of an official establishment are located in a public stockyard and are reserved for the exclusive use of the establishment, such pens shall be regarded as part of the premises of that establishment and the operator of the establishment shall be responsible for compliance

with all requirements of the regulations in this subchapter with respect to such pens.

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9 C.F.R. § 309.2 Livestock suspected of being diseased or affected with certain conditions; identifying suspects; disposition on post-mortem inspection or otherwise.

(a) Any livestock which, on ante-mortem inspection, do not clearly show, but are suspected of being affected with any disease or condition that, under part 311 of this subchapter, may cause condemnation of the carcass on post-mortem inspection, and any livestock which show, on ante-mortem inspection, any disease of condition that, under part 311 of this subchapter would cause condemnation of only part of the carcass on post-mortem inspection, shall be so handled as to retain its identity as a suspect until it is given final post-mortem inspection, when the carcass shall be marked and disposed of as provided in parts 310 and 311 of this subchapter, or until it is disposed of as otherwise provided in this part.

(b) All seriously crippled animals and non-ambulatory disabled livestock shall be identified as U.S. Suspects and disposed of as provided in § 311.1 of this subchapter unless they are required to be classed as condemned under § 309.3. Non-ambulatory disabled livestock are livestock that cannot rise from a recumbent position or that cannot walk, including, but not limited to, those with broken appendages,

severed tendons or ligaments, nerve paralysis, fractured vertebral column, or metabolic conditions.

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9 C.F.R. § 309.3 Dead, dying, disabled, or diseased and similar livestock.

(a) Livestock found to be dead or in a dying condition on the premises of an official establishment shall be identified as U.S. Condemned and disposed of in accordance with § 309.13.

(b) Livestock plainly showing on ante-mortem inspection any disease or condition that, under part 311 of this subchapter, would cause condemnation of their carcasses on post-mortem inspection shall be identified as U.S. Condemned and disposed of in accordance with § 309.13.

(c) Any swine having a temperature of 106° F. or higher and any cattle, sheep, goats, horses, mules, or other equines having a temperature of 105° F. or higher shall be identified as U.S. Condemned. In case of doubt as to the cause of the high temperature, or when for other reasons a Program employee deems such action warranted, any such livestock may be held for a reasonable time under the supervision of a Program employee for further observation and taking of temperature before final disposition of such livestock is determined. Any livestock so held shall be reinspected on the day it is slaughtered. If, upon such reinspection, or when not held for further observation

and taking of temperature, then on the original inspection, the animal has a temperature of 106° F. or higher in the case of swine, or 105° F. or higher in the case of other livestock, it shall be condemned and disposed of in accordance with § 309.13.

(d) Any livestock found in a comatose or semi-comatose condition or affected with any condition not otherwise covered in this part, which would preclude release of the animal for slaughter for human food, shall be identified "U.S. Condemned" and disposed of in accordance with § 309.13, except that such animal may be set apart and held for further observation or treatment under supervision of a Program employee or other official designated by the area supervisor and for final disposition in accordance with this part.

(e) Establishment personnel must notify FSIS inspection personnel when cattle become non-ambulatory disabled after passing ante-mortem inspection. Non-ambulatory disabled cattle that are offered for slaughter must be condemned and disposed of in accordance with § 309.13.

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9 C.F.R. § 309.5 Swine; disposal because of hog cholera.

(a) All swine found by an inspector to be affected with hog cholera shall be identified as U.S. Condemned and disposed of in accordance with § 309.13. Immediate notification shall be given by the inspector to the official in the Veterinary Services unit of the

Animal and Plant Health Inspection Service who has responsibility for the control of swine diseases in the State where the swine are located.

(b) All swine, even though not themselves identified as U.S. Suspects, which are of lots in which one or more animals have been condemned or identified as U.S. Suspect for hog cholera, shall, as far as possible, be slaughtered separately and apart from all other livestock passed on ante-mortem inspection.

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9 C.F.R. § 309.7 Livestock affected with anthrax; cleaning and disinfection of infected livestock pens and driveways.

(a) Any livestock found on ante-mortem inspection to be infected with anthrax shall be identified as U.S. Condemned and disposed of in accordance with § 309.13.

(b) No other livestock of a lot in which anthrax is found on ante-mortem inspection shall be slaughtered and presented for post-mortem inspection until it has been determined by a careful ante-mortem inspection that no anthrax infected livestock remains in the lot.

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9 C.F.R. § 309.13 Disposition of condemned livestock.

(a) Except as otherwise provided in this part, livestock identified as U.S. Condemned shall be killed by the official establishment, if not already dead. Such animals shall not be taken into the official establishment to be slaughtered or dressed; nor shall they be conveyed into any department of the establishment used for edible products; but they shall be disposed of in the manner provided for condemned carcasses in part 314 of this subchapter. The official U.S. Condemned tag shall not be removed from, but shall remain on the carcass until it goes into the tank, or is otherwise disposed of as prescribed in part 314 of this subchapter, at which time such tag may be removed by a Program employee only. The number of such tag shall be reported to the veterinary medical officer by the inspector who affixed it, and also by the inspector who supervised the tanking of the carcass.

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9 C.F.R. § 309.15 Vesicular diseases.

(a) Immediate notification shall be given by the inspector to the local, State, and Federal livestock sanitary officials having jurisdiction when any livestock is found to be affected with a vesicular disease.

(b) No livestock under quarantine by State or Federal livestock sanitary officials on account of a vesicular disease will be given ante-mortem inspection. If

no quarantine is invoked, or if quarantine is invoked and later removed, upon ante-mortem inspection, any animal found to be affected with vesicular exanthema or vesicular stomatitis in the acute stages, as evidenced by acute and active lesions or an elevated temperature, shall be identified as U.S. Condemned and disposed of in accordance with § 309.13.

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9 C.F.R. § 310.1 Extent and time of post-mortem inspection; post-mortem inspection staffing standards.

(a) A careful post-mortem examination and inspection shall be made of the carcasses and parts thereof of all livestock slaughtered at official establishments. Such inspection and examination shall be made at the time of slaughter unless, because of unusual circumstances, prior arrangements acceptable to the Administrator have been made in specific cases by the circuit supervisor for making such inspection and examination at a later time.

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9 C.F.R. § 311.1 Disposal of diseased or otherwise adulterated carcasses and parts; general.

(a) The carcasses or parts of carcasses of all animals slaughtered at an official establishment and found at the time of slaughter or at any subsequent inspection to be affected with any of the diseases or conditions named in this part shall be disposed of according to

the section pertaining to the disease or condition: *Provided*, That no product shall be passed for human food under any such section unless it is found to be otherwise not adulterated. Products passed for cooking or refrigeration under this part must be so handled at the official establishment where they are initially prepared unless they are moved to another official establishment for such handling or in the case of products passed for refrigeration are moved for such refrigeration to a freezing facility approved by the Administrator in specific cases: *Provided*, That when so moved the products are shipped in containers sealed in accordance with § 318.10(c) of this subchapter or in a sealed means of conveyance as provided in § 325.7 of this subchapter. Owning to the fact that it is impracticable to formulate rules covering every case and to designate at just what stage a disease process or a condition results in adulteration of a product, the decision as to the disposal of all carcasses, organs, or other parts not specifically covered in this part shall be left to the veterinary medical officer. The veterinary medical officer shall exercise his judgment regarding the disposition of all carcasses or parts of carcasses under this part in a manner which will insure that only wholesome, unadulterated product is passed for human food.

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9 C.F.R. § 313.1 Livestock pens, driveways and ramps.

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(c) U.S. Suspects (as defined in § 301.2(xxx)) and dying, diseased, and disabled livestock (as defined in § 301.2(y)) shall be provided with a covered pen sufficient, in the opinion of the inspector, to protect them from the adverse climatic conditions of the locale while awaiting disposition by the inspector.

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9 C.F.R. § 313.2 Handling of livestock.

(a) Driving of livestock from the unloading ramps to the holding pens and from the holding pens to the stunning area shall be done with a minimum of excitement and discomfort to the animals. Livestock shall not be forced to move faster than a normal walking speed.

(b) Electric prods, canvas slappers, or other implements employed to drive animals shall be used as little as possible in order to minimize excitement and injury. Any use of such implements which, in the opinion of the inspector, is excessive, is prohibited. Electrical prods attached to AC house current shall be reduced by a transformer to the lowest effective voltage not to exceed 50 volts AC.

(c) Pipes, sharp or pointed objects, and other items which, in the opinion of the inspector, would cause

injury or unnecessary pain to the animal shall not be used to drive livestock.

(d) Disabled livestock and other animals unable to move.

(1) Disabled animals and other animals unable to move shall be separated from normal ambulatory animals and placed in the covered pen provided for in § 313.1(c).

(2) The dragging of disabled animals and other animals unable to move, while conscious, is prohibited. Stunned animals may, however, be dragged.

(3) Disabled animals and other animals unable to move may be moved, while conscious, on equipment suitable for such purposes; e.g., stone boats.

(e) Animals shall have access to water in all holding pens and, if held for longer than 24 hours, access to feed. There shall be sufficient room in the holding pen for animals held overnight to lie down.

(f) Stunning methods approved in § 313.3 shall be effectively applied to animals prior to their being shackled, hoisted, thrown, cast, or cut.

APPENDIX D

UNITED STATES DEPARTMENT OF AGRICULTURE FOOD SAFETY AND INSPECTION SERVICE WASHINGTON, DC

FSIS DIRECTIVE	6000.1 Revision 1	8/3/06

RESPONSIBILITIES RELATED TO FOREIGN ANIMAL DISEASES (FADs) AND REPORTABLE CONDITIONS

I. PURPOSE

This directive provides Public Health Veterinarians (PHVs) instructions to follow when they believe that animals may have FADs, or when PHVs observe symptoms of FADs or other reportable conditions.

II. CANCELLATION

FSIS Directive 6000.1, dated 1/26/05

III. REASON FOR REISSUANCE

This directive is being revised to update the lists of reportable diseases into a single list instead of 2 lists (List A and List B) and to add Lagomorph (Rabbits) diseases to the list. This is necessary to correspond to changes made by the World Organization for Animal Health.

IV. REFERENCES

9 CFR Part 300 to end

V. BACKGROUND

FADs may enter the United States (U.S.) accidentally through the importation of infected animals or animal products. Such diseases also may be carried inadvertently into the U.S. via contaminated clothing, shoes, or other objects. One or more diseases also may be introduced as an act of terrorism.

The control of FADs is important because the unchecked spread of FADs into agricultural environments will have a ripple effect on many segments of the U.S. economy, including disruption of livestock marketing and trade. Outbreaks of certain animal diseases, especially zoonotic diseases, can cause considerable economic and social disruption. Other significant costs would be incurred in controlling the spread of FADs by animal quarantine, depopulation, the cleaning and disinfecting of livestock environments, and the mass disposal of animal carcasses. The USDA's Animal and Plant Health Inspection Service (APHIS) has the primary responsibility to investigate suspect conditions and to respond appropriately to the final diagnosis, including reporting conditions found in the U.S. to the World Organization for Animal Health. If an FAD is detected, a chain of events is to occur at the state and national level to mitigate the risk.

The U.S. is a member country of the OIE. As of May 2004, the organization had 167 member nations. In order to fulfill its mandate, the OIE manages the world animal health information system, based on the commitment of member countries to notify to the OIE the main animal diseases, including zoonoses. Each member country is required to report the animal diseases it detects in its territory to the OIE. The OIE then disseminates information from the reports to other countries so those countries can take necessary preventive action.

OIE member countries have approved the creation of a single list of diseases notifiable to the OIE. This new list has been approved by the International Committee and was officially published in 2006. Attachment 1, *Diseases Notifiable to the OIE*, lists diseases for species of animals under FSIS jurisdiction. The U.S. takes very seriously its commitment to reporting diseases occurring here based on OIE requirements. For more information, including the full list of diseases notifiable to the Office of International Epizooties (OIE), the OIE web site is: http://www.oie.int.

VI. Signs of FADs or Reportable Conditions

A. If inspection program personnel observe the following signs or symptoms, or come across the following information related to animals presented for slaughter, an FAD should be considered:

B. History of animals (animal records, antemortem pen cards, verbal information from the driver, or any other source of information/materials). Information on the history of animals may not be available; however, if information of this type is available, it needs to be accurately passed on to the District Office (DO) per Section VII of this directive. The following signs observed in animals transported to slaughter or information provided may point toward an FAD or a reportable disease:

1. high morbidity;

2. high mortality;

3. severe abortion storms of unknown etiology;

4. avian disease with acute deaths or central nervous system (CNS) signs; or

5. history of foreign travel; foreign visitors; foreign mail or gifts; or importation of animals, embryos, or semen.

C. Antemortem conditions that do not fit with the typical conditions for a specific domestic disease such as:

1. vesicular lesions;

2. excessive salivation or drooling;

3. sudden lameness;

4. severe respiratory conditions;

5. pox or lumpy skin conditions;

6. CNS conditions or signs of encephalitic conditions (i.e. head pressing, head tilt, circling);

7. mucosal diseases;

8. larvae in wounds, unusual myiasis (fly maggot infestation), or acariasis (mites infestation); or

9. unusual or unexplained illness or symptoms.

D. Postmortem conditions such as:

1. hemorrhagic septicemia;

2. suspicious or unusual postmortem (necropsy) findings that do not fit typical conditions; such as, necrotic foci on tonsils, enlarged spleen, or hydro pericardium, which may be seen in some domestic diseases, but if coupled with suspicious information (e.g., ante mortem findings, records) should warrant further investigation.

VII. PHV RESPONSIBILITIES

A. PHVs are to consider animals that are exhibiting these signs or symptoms (see Section VI for these associated conditions or signs) as "U.S. Suspects" or "U.S. Condemned" as appropriate under the meat and poultry product regulations.

B. PHVs are to notify the DO as soon as possible when they suspect that any undiagnosed or

unusual disease condition is reportable, foreign, or both (see Section VI for these conditions or symptoms). The PHV training module, "Reportable and Foreign Animal Diseases," covers these conditions and symptoms for these conditions. The training module can be accessed at: http://www.fsis.usda.gov/FSIS_Employees/Public_Health_Veterinarian/index.asp

C. PHVs are to provide the following information, if available, to the DO:

1. producer's name, address, county, and phone number;

2. any clinical history, including any treatments given and responses noted from the certification accompanying the animal;

3. number and species of animals affected that were presented for slaughter;

4. what conditions or signs are present;

5. any gross lesions seen; and

6. his or her contact information, including name, address, and relevant phone numbers.

D. The DO will notify the Area Veterinarian-in-Charge (AVIC) of APHIS or the State Animal Health Official (SAHO) and provide the information outlined in Section VII C.

For State animal health office contact information see: http://www.aphis.usda.gov/vs/sregs/official.html;

For APHIS area office contact information see: http://www.aphis.usda.gov/vs/area_offices.htm.

E. The SAHO or AVIC will determine how the case is to be handled and give the DO specific instructions at that time. If APHIS determines that an investigation is warranted, a Foreign Animal Disease Diagnostician from APHIS or the State will be assigned.

s/Philip S. Derfler

Assistant Administrator
Office of Policy, Program, and Employee Development
Attachment

Diseases Notifiable to the OIE

Multiple species diseases

- Anthrax
- Aujeszky's disease
- Bluetongue
- Brucellosis (Brucella abortus)
- Brucellosis (Brucella melitensis)
- Brucellosis (Brucella suis)
- Crimean Congo haemorrhagic fever
- Echinococcosis/ hydatidosis
- Foot and mouth disease
- Heartwater
- Japanese encephalitis
- Leptospirosis
- New world screwworm (Cochliomyia hominivorax)
- Old world screwworm (Chrysomya bezziana)
- Paratuberculosis
- Q fever
- Rabies

Cattle diseases

- Bovine anaplasmosis
- Bovine babesiosis
- Bovine genital campylobacteriosis
- Bovine spongiform encephalopathy
- Bovine tuberculosis
- Bovine viral diarrhoea
- Contagious bovine pleuropneumonia
- Enzootic bovine leukosis
- Haemorrhagic septicaemia
- Infectious bovine rhinotracheitis/ infectious pustular vulvovaginitis
- Lumpky skin disease
- Malignant catarrhal fever
- Theileriosis
- Trichomonosis
- Trypanosomosis (tsetse-transmitted)

- Rift Valley fever
- Rinderpest
- Trichinellosis
- Tularemia
- Vesicular stomatitis
- West Nile fever

Swine diseases

- African swine fever
- Classical swine fever
- Nipah virus encephalitis
- Porcine cysticercosis
- Porcine reproductive and respiratory syndrome
- Swine vesicular disease
- Transmissible gastroenteritis

Avian diseases

- Avian chlamydiosis
- Avian infectious bronchitis
- Avian infectious laryngotracheitis
- Avian mycoplasmosis (M. gallisepticum)
- Avian mycoplasmosis (M. synoviae)
- Duck virus hepatitis
- Fowl cholera

Sheep and goat diseases

- Caprine arthritis/ encephalitis
- Contagious agalactia
- Contagious caprine pleuropneumonia
- Enzootic abortion of ewes (ovine chlamydiosis)
- Maedi-visna
- Nairobi sheep disease
- Ovine epididyniitis (Brucella ovis)
- Peste des petits ruminants
- Salmonellosis (S. abortusovis)
- Scrapie
- Sheep pox and goat pox

Equine diseases

- African horse sickness
- Contagious equine metritis
- Dourine
- Equine encephalomyelitis (Eastern)
- Equine encephalomyelitis (Western)

- Fowl typhoid
- Highly pathogenic avian influenza
- Infectious bursal disease (Gumboro disease)
- Marek's disease
- Newcastle disease
- Pullorum disease
- Turkey rhinotracheitis

Lagomorph diseases

- Myxomatosis
- Rabbit haemorrhagic disease

- Equine infectious anaemia
- Equine influenza
- Equine piroplasmosis
- Equine rhinopneumonitis
- Equine viral arteritis
- Glanders
- Surra (Trypanosoma-evansi)
- Venezuelan equine encephalomyelitis

UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
WASHINGTON, DC

FSIS DIRECTIVE	6100.1 Revision 1	4/16/09

DO NOT IMPLEMENT THIS DIRECTIVE UNTIL: 4/17/09

ANTE-MORTEM LIVESTOCK INSPECTION

I. PURPOSE

The Agency is reissuing this directive to provide new directions to inspection program personnel (IPP) on condemning cattle that become non-ambulatory disabled after passing ante-mortem inspection. This directive provides instructions to all IPP at livestock slaughter establishments to review this Directive (see section VI). The purpose of this directive is to provide instructions to IPP on how to inspect livestock before slaughter (ante-mortem). Additionally, this directive instructs Public Health Veterinarians (PHVs) on making dispositions of livestock ante-mortem and documenting the findings.

II. CANCELLATIONS

FSIS Directive 6100.1, Ante-mortem Livestock Inspection

III. RESERVED

IV. REFERENCES

Federal Meat Inspection Act (FMIA) 21 U.S.C. 603

Regulations 9 CFR 307.2(a), 309, 310, 311, 320.1(b)(1)(iv), and part 500

FSIS Directive 5000.2, Review of Establishment Data by Inspection Personnel

FSIS Directive 6100.2, Post-mortem Livestock Inspection

FSIS Directive 6240.1, Revision 1, Inspection, Sampling, and Disposition of Animals for Tuberculosis

FSIS Directive 6900.1, Humane Handling of Disabled Livestock

FSIS Directive 6900.2, Humane Handling and Slaughter of Livestock

FSIS Form 6150-1, Identification Tag – Ante-mortem

FSIS Form 6200-14, Daily Disposition Record

FSIS Form 6200-16, Summary of Ante-mortem Examination

V. BACKGROUND

On March 18, 2009, FSIS published a final rule, "Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-mortem Inspection," (74 FR 1146, available on the Internet at http://www.fsis.usda.gov/regulations_&_policies/2009_Interim_&_Final_Rules_Index/index.asp). See Attachment 1 for the regulations pertaining to the disposition of cattle that become non-ambulatory disabled after passing ante-mortem inspection. The final rule requires that all non-ambulatory disabled

cattle, including those that have passed ante-mortem inspection, be condemned and properly disposed of and that establishment personnel notify FSIS IPP when cattle become non-ambulatory disabled after passing ante-mortem inspection.

The final rule on non-ambulatory disabled cattle did not modify 9 CFR 309.13. Under the final rule, all non-ambulatory disabled cattle that are offered for slaughter, including non-ambulatory veal calves, must be condemned and disposed of in accordance with 9 CFR 309.13. Section 309.13 of 9 CFR applies after livestock, including veal calves, have been condemned. 9 CFR 309.13(b) provides that veal calves that are unable to rise from a recumbent position and walk because they are tired or cold, before they are condemned, may be set apart and held for treatment but only under appropriate FSIS supervision.

Under the FMIA, IPP perform an examination and inspect all livestock before slaughter to determine whether the animals are fit for slaughter for human food. There are some animal health conditions that can only be assessed when the livestock are alive. Thus, if an establishment does not present animals for ante-mortem inspection in accordance with 21 U.S.C. 603 and 9 CFR 309.1, IPP [the PHV, Consumer Safety Inspector (CSI), or Food Inspector (FI)] conducting post-mortem inspection are not able to determine that carcasses are not adulterated and, therefore, cannot permit the carcasses to be marked as "inspected and passed."

FSIS will continue to permit custom slaughter operators to slaughter for human food cattle that become non-ambulatory disabled after they are delivered to a custom operation if the custom operator does not observe any other condition that would render the animal unfit for human food.

* * *

VIII. ANTE-MORTEM LIVESTOCK INSPECTION

A. Steps IPP Follow for Inspecting Livestock Ante-mortem

1. When IPP (i.e., PHV, CSI, or FI) perform ante-mortem inspection, they are to follow the directions in FSIS Directive 6900.1, Humane Handling of Disabled Livestock and 6900.2, Humane Handling and Slaughter of Livestock, for how to verify that the establishment is meeting humane handling requirements. All animals that are on the premises of the establishment, on vehicles that are on the premises, or animals being handled in connection with slaughter (e.g., livestock on trucks being staged for slaughter) are to be handled humanely. Establishment employees are to handle these animals in accordance with the requirements for the humane handling of livestock (9 CFR 313.2).

2. IPP are to perform ante-mortem inspection on the day of slaughter by observing **all** livestock (except at establishments that have voluntary segregation procedures described in section VI):

a. **at rest**;

b. **in motion.** IPP are to observe livestock from **both** sides when the slaughter class (e.g., cows and bulls) or condition of the animals (e.g., diseased, distressed) at the slaughter establishment supports observing from both sides in order to determine whether they are fit to slaughter for human consumption. At establishments where IPP other than PHVs perform ante-mortem inspection, the PHV is to correlate with the IPP on which animals the IPP are to observe from both sides.

3. When performing ante-mortem inspection, IPP are to observe:

a. the overall condition of each animal, including the head, with attention to the eyes, the legs, and the body of the animal;

b. the degree of alertness, mobility, and breathing; and

c. whether there are any unusual swellings or any other abnormalities.

4. IPP are to pass for slaughter livestock that do not show signs of diseases or abnormalities and that are fit to slaughter for human consumption.

5. When IPP find animals showing signs of abnormalities or diseases on ante-mortem inspection, IPP are to direct the establishment to set all affected animals apart into separate pens (i.e., a suspect pen) for further examination by the PHV (9 CFR 309.2(n)).

6. Non-ambulatory disabled cattle are not eligible for slaughter. IPP (non-PHVs) are to notify the PHV if non-ambulatory, disabled cattle are offered for slaughter. If non-ambulatory disabled cattle are offered for slaughter in an official establishment where the PHV is not located on premises, IPP are to:

a. identify and secure the animal. To execute the holding of an animal and to restrict the animals movement, IPP are to apply an FSIS Form 6502-1, "U.S. Rejected – U.S. Retained" tag (in this directive referred to as "U.S. Retained" tag) to the pen containing the affected animal; and

b. promptly notify the PHV assigned to that establishment.

NOTE: Alternatively, the establishment may elect to condemn and humanely destroy the non-ambulatory disabled cattle before the PHV inspects and makes a disposition.

7. PHVs are to conduct ante-mortem inspection on all non-ambulatory disabled cattle, or other livestock, offered for slaughter.

NOTE: Non-ambulatory disabled livestock are livestock that cannot rise from a recumbent position or that cannot walk. Non-ambulatory livestock may include, but are not limited to, those animals with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column, or metabolic conditions (9 CFR 309.2(b)).

8. The IIC is to contact the Policy Development Division (PDD), through supervisory channels, if he or she has not received a slaughter permit when an establishment presents for ante-mortem inspection animals used in a research investigation involving an experimental biological product, drug, or chemical (9 CFR 309.17). The PDD issues the slaughter permit to the IIC, DO, and the researcher based on information provided by the researcher.

9. If an establishment fails to present animals for ante-mortem inspection (21 U.S.C. 603 and 9 CFR 309.1), the off-line IPP are to:

a. retain the animals. The PHV is to condemn the animals;

b. notify the IIC immediately; and

c. issue a noncompliance record (NR) under the 03J01/2 procedure code.

B. Suspect Livestock

1. PHVs are to examine and take the temperature, as necessary, of abnormal or diseased livestock including those set apart by the establishment or IPP.

2. PHVs are to designate as "U.S. Suspect," by directing that a serially numbered "U.S. Suspect" tag (9 CFR 309.18(a)) be applied to livestock (9 CFR 307.2):

NOTE: PHVs do not have to apply the "U.S. Suspect" tag but are to observe that the "U.S. Suspect" tag is applied by an establishment employee.

a. having any disease condition that may cause the PHV to condemn the carcass when inspected post-mortem; and

b. presented as non-ambulatory disabled livestock, **except** cattle. PHVs are to condemn non-ambulatory disabled cattle (see VIII. D.).

NOTE: When an establishment offers for slaughter recumbent livestock for ante-mortem inspection, the establishment may help an animal that is capable of rising by providing the animal support (e.g., providing a steadying hand). Such support may not be by mechanical means, nor is the establishment permitted to lift the animal in any way. Also, once the animal has risen, it is to ambulate without assistance, so that the PHV can observe it in motion. The establishment must treat the animal humanely when attempting to have it rise or ambulate. FSIS does not consider forcing an animal to stand or ambulate by kicking or prodding (e.g., electrical prodding) to be humane.

3. Under the following circumstances PHVs do not need to apply a serially numbered "U.S. Suspect" tag:

a. cattle that are identified, segregated, and slaughtered as "U.S. Suspect" affected with ocular squamous cell carcinoma (epithelioma of the eye),

actinobacillosis, or actinomycosis, readily detected on post-mortem inspection (9 CFR 309.18(a)). The readily detected lesions along with FSIS Form 6150-1 identify the animals as being handled as U.S. Suspects; and

b. Livestock that are known to have reacted to the tuberculin test shall be identified as U.S. Suspects (9 CFR 309.2(d)) (see FSIS Directive 6240.1) and bear an official "USDA Reactor" or similar State reactor tag (9 CFR 309.2(d)).

4. PHVs are to verify that the establishment identifies any "U.S. Suspect" swine with a tattoo if they are to be mechanically-dehaired. The use of the tattoo is to maintain the identity of the swine as "U.S. Suspect" through the dehairing process (9 CFR 309.18(b)).

5. See section IX for documenting ante-mortem "U.S. Suspect" findings.

C. PHV Disposition of Cattle That Become Non-ambulatory Disabled After Ante-mortem Inspection

1. When notified by the establishment of cattle that become non-ambulatory disabled after passing ante-mortem inspection, PHVs are to condemn the cattle (9 CFR 309.3(e)); and

2. PHVs are to tag the cattle they have condemned as "U.S. Condemned" (9 CFR 309.3(e)).

D. Condemned Livestock

1. In accordance with 9 CFR 309.3(a)-(e), PHVs are to identify as "U.S. Condemned" by directing that a serially numbered metal "U.S. Condemned" ear tag (9 CFR 309.18(c)) be applied to all animals that are condemned on ante-mortem inspection (9 CFR 309.3(a)-(e)):

NOTE: PHVs do not have to apply the "U.S. Condemned" tag but are to observe that the "U.S. Condemned" tag is applied by an establishment employee.

a. livestock that are dead or in a dying condition when offered for slaughter on the premises of the official establishment;

NOTE: Non-PHVs may identify and tag dead animals as "U.S. Condemned." Only PHVs may condemn live animals.

b. livestock that are plainly showing on ante-mortem inspection any disease or condition that, under 9 CFR part 311, would cause the PHV to condemn the carcass when inspecting post-mortem;

c. any swine having a temperature of 106°F or higher, and any cattle, sheep, goats, horses, mules, or other equines having a temperature of 105°F or higher;

NOTE: If there is doubt as to the cause of the high temperature, an establishment may hold an animal for further observation, at the discretion of, and

under the supervision of, IPP. The PHV is to re-examine the animal, including taking the temperature when the establishment again offers an animal for ante-mortem inspection. If the temperature is still 106° F or above for swine or 105° F or above for other livestock, the PHV is to condemn the animal. Animals may have high temperatures because of a bacterial infection. Animals may also have increased temperatures for reasons other than disease. For example, in the summer, animals may develop heat stress from elevated environmental temperatures.

d. all animals in a comatose or semi-comatose condition;

e. all non-ambulatory disabled cattle that are offered for slaughter; and

f. all animals that have any other condition that would preclude the release of the animal for slaughter, including all livestock exhibiting clinical signs of central nervous system disorders. Clinical signs of nervous system disorders on ante-mortem inspection include, but are not limited to, the following: excitement or depression; deviation or rotation of the head; drooping of the lips, eyelids, cheeks, and ears; convulsions and tremors; paralysis; sudden onset of fainting; head pressing; aimless walking; ataxia; and blindness. Other diseases may mimic nervous system disorders. For example, lameness may be difficult to differentiate from ataxia or paresis, and shivering from the cold may be difficult to differentiate from tremors. IPP are to retain any

animal exhibiting signs of nervous system disorders for veterinary disposition (9 CFR 309.4(a)).

2. If an establishment requests to hold livestock, including veal calves that cannot rise from a recumbent position or that cannot walk because they are tired or cold, for treatment or to treat the livestock set apart (9 CFR 309.13(b)), the PHV is to:

a. verify that the establishment maintains the identity of the animals and holds the animals in an area that bears the documented identification of the animals, or that the establishment has received permission from the appropriate local, State, or Federal livestock sanitary official having jurisdiction to move the animals off premises;

NOTE: For example, if the establishment presented a market steer for slaughter, and the animal suffered an injury after passing ante-mortem inspection (e.g., the market steer broke its leg and became non-ambulatory disabled), then in this example the market steer is condemned. Also, the establishment may not divert and slaughter the market steer having been presented for ante-mortem inspection under custom exempt. The establishment may still set apart and treat the market steer.

b. change the FSIS Form 6150-1, Identification Tag – Ante-mortem Form – by crossing out the word "slaughter" and by writing in the words "held for treatment" in the appropriate space for animals that are treated on premises; and

c. just before the animal is shipped, remove the "U.S. Suspect" or "U.S. Condemned" tag on animals that are to be treated off premise.

3. PHVs are to:

a. verify the disposal of condemned livestock by the establishment (9 CFR 314), and that the establishment maintains the required records (9 CFR 320), or that the animals are set apart and held for further observation or treatment under supervision of a FSIS program employee; and

NOTE: It is the responsibility of the PHV to verify that an animal that is identified as "U.S. Condemned" is either disposed of properly or held for further observation or treatment by the establishment (see 9 CFR 309.13(a)(b)).

b. complete FSIS Form 6150-1, Identification Tag – Ante-mortem, for each animal identified as "U.S. Condemned" on ante-mortem inspection.

NOTE: IPP may record multiple deads (e.g., DOAs) and the associated serial "U.S. Condemned" tag (Z-tag) numbers on a single FSIS Form 6150-1, Identification Tag – Ante-mortem.

* * *

IX. DOCUMENTATION AND ENFORCEMENT

A. Identification System

IPP are to verify that the establishment has an animal identification system that accurately identifies each animal and establishes that IPP have

performed ante-mortem inspection on that animal (9 CFR 307.2(a), 310.2(a)(b), and 320.1(b)(1)). An example is the pen card system.

B. Documentation

1. PHVs are to complete FSIS Form 6150-1, Identification Tag – Ante-mortem, for each animal identified as a "U.S. Suspect" or "U.S. Condemned" on ante-mortem inspection and file the form in the inspection office. IPP are to retain the form for one year.

2. Complete Form 6150-1, Identification Tag – Ante-mortem, by recording the following:

a. Slaughter at Est. No. – Indicate the official establishment number where the animal is to be slaughtered;

b. Condemn or Suspect Tag No. – Write in the tag number and cross out the not applicable "U.S. Condemned" or "U.S. Suspect;"

c. Kind of Animal – Species, breed, or class of animal (e.g., Hereford Bull, Hampshire gilt, and mixed breed ewe);

d. Sex;

e. Tagged For – Name of condition causing animal to be a suspect. Additional information may be included on the back of the form, write "see back of form" on the front when the back is used;

f. Temperature – Actual temperature of the animal (TB reactors and animals the PHV suspects may have an abnormal temperature);

g. Weight – Estimate the animal's weight in pounds;

h. Remarks – Brief description of ante-mortem findings that may aid post-mortem disposition. Also, record back tags and any other identifying numbers;

i. PHV Signature – A PHV is to sign the form when an animal is condemned;

j. Date – Current date; and

k. Post-mortem Report – Use of the Post-mortem Report section of the form is optional. The observations documented on the form should support the decision to tag the bovine as "U.S. Suspect," including any re-examinations of cattle. Attach FSIS Form 6150-1 to the associated FSIS Form 6200-14, Daily Disposition Record. Retain FSIS Form 6200-14 and, if attached, FSIS Form 6150-1, for one fiscal year.

3. Additional uses for FSIS Form 6150-1, Identification Tag – Ante-mortem, include:

a. For a TB reactor, use the reactor tag number instead of the "U.S. Suspect" tag number on line 2;

b. For epithelioma, actinobacillosis, and actinomycosis, include the number of animals in the lot on line 2 and state animals are "untagged".

NOTE: A separate FSIS Form 6150-1, Identification Tag – Ante-mortem is not necessary for each bovine with epithelioma of the eye, actinobacillosis, or actinomycosis. However, the PHV is to verify that the establishment segregates affected animals into a separate lot and is to record the condition and number of animals on the form. The establishment determines the size of the lot. PHVs are to record the condition (ocular squamous cell carcinoma, actinobacillosis, or actinomycosis) and the number of animals affected with each condition. PHVs are to use a separate form for each group of animals with a separate condition in a lot. When the animals are slaughtered, the PHV is to identify each animal individually with a multi-sectioned "U.S. Rejected – U. S. Retain" tag and record them as suspects on the Daily Disposition Record, FSIS Form 6200-14 (see FSIS Directive 6100.2, Post-mortem Livestock Inspection, Ch. IV. I. B. 2.). Under these circumstances the FSIS Form 6150-1 serves as the means to identify the group of animals with each condition.

c. PHVs are to complete FSIS Form 6150-1 for each "U.S. Condemned" animal, alive or dead. Mark through suspect and record the condemned tag number.

4. The PHV or designee is to record the appropriate ante-mortem information on the Daily

Disposition Record, FSIS Form 6200-14, following the directions in FSIS Directive 6100.2, Post-mortem Livestock Inspection, Chapter IV; and

5. The PHV or designee is to complete Form 6200-16, Summary of Ante-mortem Examination, when directed to do so by the FLS. When the PHV has been directed to complete this form, he/she is to do so only on days of slaughter. IPP are to retain this form for one year. Complete the Summary of Ante-mortem Examination, FSIS Form 6200-16, by recording the following:

a. Date of last report of this species. This refers to the last date this species was slaughtered,

b. Establishment number,

c. Today's date,

d. Name of species inspected (use a separate FSIS Form 6200-16 for each species inspected on this date),

e. Number of animals passed for regular slaughter (does not include suspects),

f. Number of animals that were suspected on the previous day but not slaughtered,

g. Number of animals suspected today (include both tagged and handled as suspects),

h. Total of lines f and g,

i. Number of animals that were suspected today and the previous day but later released and not slaughtered as suspects,

j. Number of animals that died in the pens today and the previous day after being tagged as suspects from today and the previous day,

k. Number of suspect animals slaughtered on this date,

l. Total of lines i, j, and k,

m. Number of suspect animals that are not slaughtered and are being held as suspects from today and the previous day,

n. Number condemned on ante-mortem plus dead animals (do not include suspects that died in pens – they are reported on line j),

o. Write in "dead" or cause for condemnation and the number of animals disposed of in that category,

p. The first condemned tag number and the last condemned tag number used, and

q. The signature of IPP completing the report.

Refer questions regarding this directive to the Policy Development Division through ask FSIS at http://askfsis.custhelp.com or by telephone at 1-800-233-3935.

s/Philip S. Derfler

Assistant Administrator
Office of Policy and Program Development

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UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
WASHINGTON, DC

FSIS DIRECTIVE	6100.2	9/17/07

POST-MORTEM LIVESTOCK INSPECTION

CHAPTER I – GENERAL

I. PURPOSE

The purpose of this directive is to provide instructions to the Food Safety and Inspection Service (FSIS) personnel on how to inspect livestock after slaughter (post-mortem). In addition, this directive officially cancels the Meat and Poultry Inspection Manual Subparts 9A and 9B (post-mortem livestock section). Inspection program personnel are no longer to use the Meat and Poultry Inspection Manual. This directive updates information from, and cancels, FSIS Directive 6200.1, Preparation and Submission of FSIS 6200 Form Series. Finally, this directive instructs Public Health Veterinarians (PHVs) on how to make dispositions for livestock post-mortem and how to document the findings.

Key Points Covered

- *Inspecting livestock post-mortem*
- *Making dispositions*
- *Documenting post-mortem findings*

II. CANCELLATIONS

Meat and Poultry Inspection Manual Subparts 9A and 9B, post-mortem livestock sections

FSIS Directive 6160.1, Inspection Procedure for Lamb

FSIS Directive 6200.1, Preparation and Submission of FSIS 6200 Form Series

FSIS Notice 41-06, Inspection of Ox Tails

III. RESERVED

IV. REFERENCES

Federal Meat Inspection Act (FMIA) 21 U.S.C. 604

Regulations 9 CFR 310, 311, 325 and 500.2

FSIS Directive 6000.1, Revision 1, Responsibilities Related to Foreign Animal Diseases (FADs) and Reportable Conditions

V. BACKGROUND

Inspection program personnel, under the Federal Meat Inspection Act (FMIA), examine and inspect carcasses post-mortem during the slaughter process. Inspection program personnel inspecting carcasses in establishments determine whether carcasses are wholesome and not adulterated. The FMIA requires that FSIS inspection program personnel inspect the carcasses and parts of carcasses. Product that is wholesome and not adulterated, and passes for human consumption, may bear the mark of inspection

as provided by 21 U.S.C. 604 and 9 CFR 310.1(a). Identification and inspection of the carcass includes the head, tail, tongue, thymus gland, and all viscera of each animal slaughtered (9 CFR 310.2(a)).

* * *

CHAPTER II – POST-MORTEM INSPECTION

Inspection program personnel conduct post-mortem inspection in the following manner.

* * *

V. SWINE

A. Heads

1. Inspection program personnel are to:

a. observe the head and cut surfaces;

b. incise and observe the mandibular lymph nodes; and

c. observe the carcass when required.

2. Inspection program personnel are to follow Chapter II, I., A. 4., 5., and 6. for what to look for and the actions to take when inspecting the heads of swine post-mortem, except for SRMs for BSE, since BSE is not an issue.

B. Viscera

1. Inspection program personnel are to:

a. observe the eviscerated carcass, viscera, and parietal (top) surface of the spleen;

b. observe and palpate the mesenteric lymph nodes;

c. palpate the portal lymph nodes;

d. observe the dorsal surfaces of the lungs and the mediastinal lymph nodes;

e. the bronchial lymph nodes; then,

f. turn the lungs over and observe the ventral surfaces of the lungs;

g. observe the heart and dorsal surface of the liver; and

h. turn the liver over and observe the ventral surface.

NOTE: Inspection program personnel are to observe the nongravid uteri and ovaries when saved for edible use.

2. Inspection program personnel are to follow Chapter II, I., B. 1b., 2.b., 3.b., 4., and 5. for what to look for and the actions to take when inspecting the viscera of swine post-mortem, except for SRMs for BSE, since BSE is not an issue.

C. Carcasses

1. Inspection program personnel are to:

a. observe the back of the carcass by looking in a mirror, or when a mirror is not present,

by turning the carcass to observe the back of the carcass; and

b. observe the front parts and inside of the carcass; then grasp, turn, and observe both sides of the kidneys.

2. Inspection program personnel are to follow Chapter II, I., C. 4., 5., and 6. for what to look for when inspecting swine carcasses post-mortem, except for SRMs for BSE, since BSE is not an issue.

CHAPTER III – MAKING DISPOSITIONS POST-MORTEM

PHVs play a critical role in ensuring that the public health is protected by appropriately identifying and addressing livestock affected with disease conditions and ensuring that there is an appropriate disposition of affected carcasses and parts. PHVs are to conduct a thorough and complete post-mortem examination of carcasses or parts that are held for their final examination. In making dispositions, the PHV should use a consistent, systematic approach for evaluating the carcass. For example, if a PHV starts the examination with the carcass, follows with the viscera, and ends with the head, then he or she should use this same method every time.

PHVs may seek diagnostic assistance from the pathology laboratory. PHVs are to consider the laboratory's report within the context of ante-mortem and post-mortem findings. For residues, PHVs are to

make final dispositions based on the regulations (9 CFR 311.39) and whether a tissue is 1) in compliance either as residue not detected or positive but non-violative; or 2) noncompliant as residue detected at a violative level. For information on foreign animal diseases, PHVs are to refer to FSIS Directive 6000.1, Responsibilities Related to Foreign Animal Diseases (FADs) And Reportable Diseases.

I. REGULATORY ACTIONS

When PHVs find diseases and abnormalities, they are to:

1. examine all livestock carcasses showing abnormalities that inspection program personnel retain at post-mortem (9 CFR 310.3); and

2. examine and inspect all "U.S. Suspect" animals identified on ante-mortem inspection.

II. CORRELATING WITH THE TEAM

PHVs are to, during work unit meetings, meet with the inspection team as necessary to review pathology and regulatory requirements for addressing each condition (e.g., show, explain, discuss, and answer questions). PHVs may utilize "The Entry Training for the PHV" modules on Post-Mortem Inspection and Multi-Species Dispositions for correlating.

http://www.fsis.usda.gov/FSIS_Employees/Public_Health_Veterinarian/index.asp.

The following are specific disease conditions and the procedures PHVs are to follow to make carcass and parts dispositions. This section provides disposition information for livestock conditions taken from the discontinued Manual. PHVs may find other post-mortem disposition information in the "Entry Training for the PHV", Multi-Species Disposition and Post-mortem Inspection modules at the link below. PHVs are to use and follow the directions in this directive for dispositions.

http://www.fsis.usda.dov/FSIS_Employees/Public_Health_Veterinarian/index.asp.

III. CYSTICERCOSIS

A. Recognizing Cysticercosis

Cysticercosis is a condition caused by the presence of the larval form of the beef tapeworm, *Taenia saginata*, in the carcass tissues. Beef, pork, or sheep carcasses affected with cysticercosis will contain live, dead, or degenerated cysts in the heart, tongue, esophagus, or muscles. The live cyst will appear as a vesicle or small bladder (balloon) filled with fluid. In most cases, the cyst will be dead and degenerated to some extent and will appear as small foci (small localized bodily infection) of fibrotic (hard, thick) tissue that may or may not be calcified and gritty in

texture. In addition to these lesions, the associated muscle tissue may be watery or discolored.

NOTE: Inspection program personnel will find information regarding shipment and control of products containing cysticercosis under 9 CFR 325.7.

* * *

E. Steps PHVs Follow for Swine Affected with Cysticercosis (Tapeworm Cysts)

1. When inspection program personnel retain swine carcasses for cysticercosis on post-mortem inspection, PHVs are to:

a. examine the cheeks, heart, and esophagus by sight and numerous incisions;

b. make several deep longitudinal incisions into the tongue;

c. remove the peritoneum from the diaphragm and examine the muscles of the diaphragm by numerous incisions; and

d. carefully examine the cut surfaces of muscles exposed during regular dressing procedures (ventral muscles of the ham).

2. If, after performing the inspections as described in Chapter III, III. E. 1. a-d above, PHVs find:

a. only the initial lesions, they are to make the disposition based on these findings;

b. any additional lesions, they are to:

i. make incisions parallel to cuts as described in Chapter III, III. E. 1.d.; and

ii. remove the peritoneum from the abdominal muscles in the flank and paralumbar regions. Examine visually and then make several incisions to aid in the examination.

3. If PHVs find:

a. no additional lesions on findings through Chapter III, III. E. 2.b., they are to make the disposition based on these findings; or

b. additional lesions, they are to make deep, bold incisions into the heavily-muscled primal parts to determine if various parts of the musculature expose one or more cysts on most of the cut surfaces.

4. PHVs are to:

a. confirm the diagnosis of swine cysticercosis (*Cysticercus cellulosae*) or cases resembling such disease by sending samples to the Pathology Group of the FSIS Eastern Laboratory – Athens, Georgia. PHVs are to retain swine carcasses pending diagnostic results from the laboratory; and

b. follow the directions in FSIS Directive 6000.1, Revision 1, Responsibilities Related to Foreign Animal Diseases (FADs) and Conditions, for reporting diseases.

F. Disposition of Swine Carcasses with Cysticercosis

PHVs are to:

1. condemn the carcass when porcine cysticercosis infestation is excessive (when the lesions are too extensive to be removed by trimming the carcass);

2. pass for cooking, any swine carcass affected with *Cysticercus cellulosae* that is less than excessively affected;

3. verify that the carcass is cooked at 170° F for 30 minutes after removal and condemnation of all affected areas; and

4. verify removal of "retain" tags only after the product has met the processing restrictions in 9 CFR 311.24.

* * *

IV. EOSINOPHILIC MYOSITIS (EM)

A. Recognizing EM

The most common lesions of EM are the irregularly distributed yellowish-green, yellowish-white, and red spindle-shaped lesions found in the heart and tongue. Less common lesions are the large, well-defined, bright green to greenish-gray areas found in the more active muscles (e.g., round, shoulder, esophagus, heart, and brisket). Inspection program personnel may not notice the lesions until the carcass is broken into primal parts. PHVs will most readily

detect EM in warm carcasses. Chilling causes muscle to contract and reduces the size and visibility of lesions present. In most cases, EM affects the more active muscles first and affects them more severely than other muscles.

B. Steps PHVs Follow for Carcasses with EM

When inspection program personnel find EM on post-mortem inspection, PHVs are to:

1. thoroughly incise and observe the lateral and medial masticatory muscles and the heart;

2. observe and palpate the esophagus;

3. make several deep longitudinal incisions into the tongue;

4. thoroughly incise and observe the diaphragm and pillars after removal of the peritoneum; and

5. observe the cut surfaces of muscles exposed during dressing operations (ventral muscles of the neck, the brisket, and the medial muscles of round).

6. make several parallel incisions to all such cut surfaces when lesions are in any of the locations as described in Chapter III, IV. B. 5.;

7. incise thoroughly and observe abdominal muscles in the flank and paralumbar region; and

8. slash freely and examine closely the affected primal parts exposed during the above procedures if PHVs find any lesions in those areas.

C. Disposition of Carcasses Affected with EM

PHVs are to:

1. condemn affected parts when localized lesions are present and only certain parts are affected (head, tongue, heart, esophagus, diaphragm, and pillars);

2. follow the disposition requirements in the regulations when carcass muscles other than the diaphragm and pillars are affected;

3. condemn the carcass if lesions in the musculature of the carcass are extensive and impractical to remove; and

4. pass the carcass for comminuted cooked product when lesions are slight, or the establishment personnel cannot remove the lesions easily and completely. This outcome may occur if the lesions are slight or of such character as to be insignificant from a standpoint of wholesomeness. PHVs are to pass the carcass or parts for use in the manufacture of comminuted cooked product after removal and condemnation of the visibly affected portions (9 CFR 311.35).

NOTE: A carcass condemned for EM is eligible for shipment for animal food (pet food) if: (1) the

Front-line Supervisor (FLS) grants permission, and (2) the establishment adequately identifies, slashes freely, and denatures (9 CFR 325.11 and 325.13(a)(2)) all parts of the carcass in an inedible area under FSIS supervision.

V. SARCOCYSTOSIS

A. Recognizing Sarcocystosis

Sarcocystosis is caused by specific protozoans not considered pathogenic for humans in the United States. Sarcocystosis is most frequently seen in older sheep. Inspection program personnel may detect the lesions in the esophagus first. Lesions are white, semi-oval, cigar-shaped, or rice grain-shaped lesions. Inspection program personnel may also detect lesions in the diaphragm, skin muscles, internal abdominal (stomach) muscles, or intracostal (muscles between the ribs) muscles. PHVs may find the lesions in the skeletal muscles, after incision and observation of primal parts.

B. Steps PHVs Follow for Carcasses with Sarcocystosis

1. When inspection program personnel detect sarcocystosis during routine post-mortem inspection procedures, PHVs are to re-examine the esophagus, superficial and cut surfaces of the muscles, diaphragm, and the internal abdominal and intercostal muscles.

2. If PHVs find lesions in locations other than the esophagus, they are to incise the muscles of the shoulder, round, and back to expose the deep muscle tissues.

3. PHVs are to condemn the carcass if the lesions are impractical to remove (9 CFR 311.35).

NOTE: A carcass condemned for sarcocystosis is eligible for shipment for animal food (pet food) by the establishment when: (1) the FLS grants permission, and (2) under FSIS supervision, the establishment identifies, slashes freely, and denatures (9 CFR 325.11 and 325.13(a)(2)) all parts of the carcass in an inedible area.

VI. EPITHELIOMA OF THE EYE

A. Recognizing Epithelioma of the Eye

Epithelioma is a neoplastic (cancerous) lesion involving the eye and surrounding tissues. Metastasis (disease spreads to different parts of the body) may occur to the lymph nodes and lungs. Infection, suppuration (the formation of pus), and necrosis (death or rotting of tissues) of the tissues around the eye may also occur.

B. Disposition of Epithelioma of the Eye

Absence of an eye or associated structure in mature cattle may indicate prior surgical removal of epithelioma. PHVs are to:

1. condemn the head of such carcasses; and

2. condemn the head, viscera, and carcass if they find metastatic lesions, cachexia or evidence of absorption or secondary changes, or involvement of the osseous (bony) structures of the head with extensive infection, suppuration, and necrosis (9 CFR 311.12).

VII. MELANOSIS

A. Recognizing Melanosis

Melanin is a normal black pigment of the body. Melanosis is excessive melanin deposits or deposits in abnormal locations.

B. Disposition of Carcasses with Melanosis

PHVs are to:

1. condemn carcasses with generalized pigmentary deposits of melanin (9 CFR 311.13);

2. condemn affected carcasses, organs, or parts when the establishment cannot remove melanin completely; when its removal is impractical; or, when it makes a carcass, organ, or part unfit for people to eat;

3. remove melanin deposits when they extend into spinal nerve sheaths and meat; however, slight melanin deposits in spinal meninges are insignificant;

4. remove only tumorous or smeary uniform melanin deposits over or in circumscribed skin areas of swine; and

5. record melanin deposits under pigmentary conditions on FSIS Form 6200-14, except record melanin deposits under carcinoma when they are associated with malignant tumor formation.

VIII. XANTHOSIS

A. Recognizing Xanthosis

Xanthosis is the deposition of excessive quantities of cellular waste pigments. The condition is usually seen in older cattle and those suffering from a chronic wasting disease. PHVs will only find Xanthosis during post-mortem inspection. Xanthosis more commonly affects the musculature of the heart and head. Affected muscle has dark brown or coffee-colored discoloration of otherwise normal tissue.

B. Disposition of Carcasses with Xanthosis

PHVs are to:

1. condemn carcasses with generalized pigmentary deposits; or

2. pass for food carcasses with less than generalized distribution of pigmentary deposits after condemnation and removal of the affected areas (9 CFR 311.13).

IX. CAROTENOSIS

A. Recognizing Carotenosis

Carotenoid pigments enter the body with food. Therefore, they are classified with the exogenous pigments. When carotenoid pigments are deposited in the fat tissues and liver to the extent they become grossly visible, the resulting discoloration of tissues is carotenosis. To determine carotenosis, place a white paper towel or napkin on the cut surface of the liver. A bronze-orange stain indicates carotenoid pigment. Deposition of carotenoid pigments in the fatty tissue does not affect carcass disposition.

B. Disposition of Carcasses with Carotenosis

Inspection program personnel are to condemn livers with carotenosis (9 CFR 311.13).

X. ICTERUS

A. Recognizing Icterus

If, for any reason, the amount of bilirubin (waste product that results from the breakdown of hemoglobin molecules from worn out red blood cells) increases in the blood and therefore in the tissues, a yellowish pigmentation of the tissues arises that is called icterus or jaundice. Look for icterus where the tissues are normally very white or pale, such as (1) the sclera (white part) of the eye, (2) tendons, (3) pleura (lining of the chest cavity), (4) peritoneum (lining of the

abdominal cavity), (5) omentum (tissue that extends from the stomach to the adjacent organs in the abdominal cavity), (6) cut surface of abdominal wall fat, (7) joint surfaces, or (8) mesentery (fold of tissue attaching small intestines to the body wall). Fat may be yellow from diet, breed, and age changes that are essentially normal. Yellow fat is normal in some animals.

B. Disposition of Carcasses Showing Signs of Icterus

PHVs are to:

1. defer final disposition of carcasses with a slight yellow discoloration and no visible pathological changes in the organs until the establishment has the opportunity to chill the carcasses; then

a. PHVs are to re-examine the carcasses preferably under natural light or a good quality light of at least 50 footcandles and make a disposition; and

b. pass the carcass for food if the discoloration disappears, and there are no other conditions warranting a different disposition.

2. condemn carcasses showing any degree of icterus including either:

a. a parenchymatous degeneration of organs, as the result of infection or intoxication; or

b. showing pronounced yellow or greenish yellow discoloration without evidence of infection or intoxication (9 CFR 311.19).

XI. NEUROFIBROMA (NERVE SHEATH TUMOR)

A. Recognizing Neurofibroma

Neurofibroma is a neoplasia of nerve sheath cells most often seen in cattle. Neurofibromas are found along any nerve trunk of the carcass but are most often found in the intercostals (between the ribs) and paravertebral spaces [beside the spinal (back) bones], heart, brachial plexus (network of nerves located between the shoulder and neck), and celiac plexus (network of nerves located behind the stomach and below the diaphragm). They may be seen as multiple nodular enlargements along any nerve. Neurofibromas are generally regarded as benign but may metastasize to regional lymph nodes. Neurofibromas are often seen in multiple sites because of multicentric origin of neoplasms. The tumors may be firm or soft and often have gelatinous centers and appear as shiny, glistening, white-to-gray, lobulated, firm nodular growths on or within the nerve.

B. Disposition of Carcasses with Neurofibroma

PHVs are to:

1. examine the brachial and celiac plexus for lesions when inspection program personnel find

neurofibromas when performing post-mortem inspection;

2. condemn an individual organ or part of a carcass affected with a neoplasm; and

3. condemn the entire carcass if there is evidence of metastasis, or that the general condition of the animal has been adversely affected by the size, position, or nature of the neoplasm (9 CFR 311.11).

XII. ARTHRITIS

Disposition of Carcasses with Arthritis

PHVs are to:

1. condemn joints affected with arthritis;

2. verify removal of lymph nodes corresponding with affected joints;

3. verify that the establishment does not open joint capsules until after they remove affected joints; and

4. condemn the carcass if systemic involvement is present (9 CFR 311.7).

XIII. OTHER DISEASE CONDITIONS

A. Slight Abscesses in Cattle and Swine

When PHVs find slight abscesses in cattle and swine heads, they are to:

1. pass the head for food after removal of the lymph node when a small, well-encapsulated abscess is in a cervical lymph node; and

2. verify removal of all affected lymph nodes, including mandibular and adjacent lymph nodes, when heads with slight abscesses are passed for food (9 CFR 311.14).

B. Chronic Lesions

If PHVs observe chronic lesions that do not create a generalized condition in the carcass when conducting post-mortem dispositions, they are to verify complete removal of all chronic lesions, including adhesions (9 CFR 311.14).

* * *

II. COMPLETING THE CERTIFICATE OF ANTE-MORTEM OR POST-MORTEM DISPOSITION OF TAGGED ANIMALS, FSIS FORM 6000-13

A. PHVs are to prepare this form for establishment management if requested. FSIS Form 6000-13 is an accountable item. The certificate is void if it contains any erasures or alterations.

B. To complete the form, PHVs are to record:

1. the district number;

2. the establishment name;

3. the establishment number;

4. the date of the disposition;

5. the species;

6. the "U.S. Rejected – U.S. Retained" tag number used on the FSIS Form 6200-14 on the day of condemnation for post-mortem cases;

7. the "U.S. Condemned" tag number from FSIS Form 6150-1, Identification Tag – Ante-Mortem, for ante-mortem cases;

8. any other ear tags, backtags, and other identifying devices affixed to the animal;

9. the diagnosis made on the day of slaughter on the FSIS Form 6200-14, or the diagnosis on the FSIS Form 6150-1 in ante-mortem cases; and

NOTE: If establishments elect to humanely euthanize non-ambulatory disabled cattle, PHVs are to write "non-ambulatory (USDA condemned)" in the "Diagnosis/Condition" column of FSIS Form 6000-13.

10. the word "condemned" for each "U.S. Retained" or "U.S. Condemned" entry.

C. After completing the form, PHVs are to:

1. sign the form and enter the date;

2. make certain that all unused spaces are lined or crossed out;

3. give the original to establishment management; and

4. file the copy in the inspection office.

For technical questions, contact the Policy Development Division (formerly the Technical Service Center) at 1-800-233-3935.

s/Philip S. Derfler

Assistant Administrator
Office of Policy, Program, and Employee Development

UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
WASHINGTON, DC

FSIS DIRECTIVE	6900.01, Rev. 1	11-2-98

HUMANE HANDLING OF DISABLED LIVESTOCK PART ONE – BASIC PROVISIONS

I. PURPOSE

This directive gives inspection program personnel procedures for ensuring the humane handling of disabled livestock by establishment employees from the time the livestock enter official establishment premises until the time they are slaughtered by humane methods.

II. CANCELLATION

FSIS Directive 6900.1, dated 4/29/92

III. REASON FOR REISSUANCE

This directive is being revised to inform all inspection program personnel of a new policy permitting inspection program personnel to either be outside transport vehicles or enter onto transport vehicles to conduct antemortem inspection if disabled livestock cannot be humanely removed from the vehicles by establishment employees. The decision to enter a transport

vehicle to conduct antemortem inspection or to conduct antemortem inspection from outside the vehicle is to be made by each inspector individually and is completely voluntary. Inspection personnel may enter onto the transport vehicle or perform antemortem inspection from outside the transport vehicle if, in his or her professional opinion, he or she can safely and adequately conduct the antemortem inspection. No adverse or disciplinary action can or will be taken against any inspection program personnel choosing not to conduct antemortem inspection of disabled livestock on or from outside of a transport vehicle.

IV. REFERENCES

Humane Methods of Slaughter Act of 1978
9 CFR 304.2, 308.1, 308.3, 309.1(b), 309.2(b), 314.1 and 314.3
9 CFR Part 313
9 CFR 329.6
9 CFR 352.10
FSIS Directive 5400.5, dated 11/21/97
FSIS Directive 8820.1, Revision 2, dated 9/6/96

V. DEFINITIONS

A. Ambulatory Disabled Livestock: Livestock capable of walking but with physical impairment such as central nervous system signs, lameness or similar conditions.

B. Humane Handling: Handling and slaughter practices that cause a minimum of excitement, pain, injury or discomfort to livestock.

C. Non-Ambulatory Disabled Livestock: Livestock that cannot rise from a recumbent position (downer) or that cannot walk, including, but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column or metabolic conditions.

D. Sufficient Personnel: Establishment personnel who, in the opinion of appropriate inspection program personnel, are physically capable of safely assisting inspection program personnel in restraining livestock and with the humane handling of ambulatory and non-ambulatory disabled livestock.

E. Suitable Equipment: Establishment equipment that is, in the opinion of appropriate inspection program personnel, capable of enabling establishment personnel to move non-ambulatory disabled livestock with a minimum of excitement, pain or injury. This includes forklift or bobcat-type vehicles and self-propelled tractors capable of pulling stone boats (sleds) or similar conveyances, those conveyances themselves, and holding chutes, and a voltmeter or other suitable equipment that is capable of verifying voltage of electric prods attached to AC current.

F. Suitable Restraints: Establishment-provided restraints that are, in the opinion of appropriate inspection program personnel, capable of preventing

injuries to Agency personnel when performing antemortem inspection, including when conducted on a transport vehicle, and minimizing excitement, pain or injury to livestock upon movement, such as holding chutes, squeeze pens and swinging gates.

VI. BACKGROUND

A. Authorized inspection program personnel verify that disabled livestock handling procedures are carried out by official establishment employees to ensure that livestock that show signs of physical impairment or that are non-ambulatory are set apart and humanely slaughtered. They also ensure that the official establishment has adopted humane handling and slaughter practices for all livestock in accordance with the Humane Methods of Slaughter Act of 1978. Unconscious disabled livestock cannot receive antemortem inspection. They must be humanely handled, or condemned and disposed of in accordance with FSIS regulations.

B. Conscious disabled livestock cannot be dragged; however, they may be kept inside the transport vehicle in which they were transported to the establishment, or humanely moved to a designated covered area or pen by sufficient personnel and suitable equipment for antemortem inspection. Once a vehicle has entered an official slaughter establishment's premises, it is considered to be part of that establishment's premises. Inspection program personnel may go onto a transport vehicle to perform antemortem inspection of disabled livestock if, in his

or her professional opinion, he or she can safely and adequately conduct the antemortem inspection. They may also conduct antemortem inspection outside the transport vehicle, if they choose. This action is voluntary and is performed at inspection program personnel discretion. No retaliatory action may or will be taken against inspection program personnel, by FSIS or an establishment, who choose not to perform an antemortem inspection on disabled livestock that cannot be humanely removed from the vehicle.

C. Non-ambulatory disabled livestock that have not received antemortem inspection and cannot be humanely moved must be humanely killed and condemned before they may be transported on the slaughter establishment's premises. This includes non-ambulatory disabled livestock that cannot be inspected while on the transport vehicle. Inspection program personnel should can [sic] and require that disabled livestock be humanely handled while on the transport vehicle at the slaughter establishment.

PART TWO – HUMANE HANDLING OF DISABLED LIVESTOCK BEFORE SLAUGHTER

I. GENERAL FSIS INSPECTION PROCEDURES FOR ENSURING HUMANE HANDLING OF DISABLED LIVESTOCK

A. Disabled Livestock (general).

1. Inspection program personnel will:

a. Grant permission for movement of disabled livestock on the official establishment premises

after the establishment has provided sufficient personnel and suitable equipment to ensure humane handling.

b. Verify disabled livestock handling procedures carried out by establishment employees to ensure humane handling of disabled livestock from the time the transport vehicle carrying the disabled livestock enters the premises of the official slaughter establishment until they are humanely slaughtered, or condemned and killed in accordance with FSIS regulations.

c. Ensure that the establishment provides sufficient personnel to handle (separate, move and restrain) disabled livestock humanely, with a minimum of excitement, injury and discomfort.

d. Ensure that establishment management provides equipment and restraints suitable for humanely moving and restraining disabled livestock and other livestock unable to move.

e. Ensure that facilities are acceptable and are maintained in good condition:

i. Livestock pens, driveways and ramps are free from sharp corners, sharp or protruding objects, loose boards or broken planking, and unnecessary openings where livestock may be injured.

ii. Slip resistant floors, cleated ramps and sand for use during winter months are examples of acceptable construction and maintenance.

iii. Covered pens, including the interior of transport vehicles, sufficient, in the opinion of inspection program personnel, to protect U.S. Suspect livestock (diseased and disabled) from adverse climatic conditions while awaiting disposition, after establishment personnel have separated them from normal ambulatory animals.

iv. Sufficient space in holding pens to prevent overcrowding that might cause livestock to slip, fall or become injured and to allow livestock held overnight to lie down.

v. Protective padding or another soft surface is in place where needed to absorb shock and minimize pain and injury when unloading disabled livestock from transport vehicles, such as foam rubber pads, wood shavings, sand or straw.

f. Ensure that establishment personnel separate disabled livestock from the normal ambulatory livestock and place the disabled livestock in appropriate covered pens.

g. Ensure that establishment personnel handle and move disabled ambulatory livestock with a minimum of excitement and discomfort.

i. Livestock should not be driven faster than a normal walking speed.

ii. Use of electric prods, canvas slappers or other implements to drive animals should be minimized. Electric prods attached to AC current should be reduced to the lowest effective voltage not

to exceed 50 volts AC, as verified with a voltmeter or other suitable equipment.

iii. Pipes, sharp objects or other items that would cause injury or unnecessary pain to the animal should not be used to drive livestock.

h. Ensure approved stunning methods are applied to livestock before they are shackled, hoisted, thrown, cast or cut.

i. Ensure that any disabled livestock are protected from adverse weather conditions after they enter official establishment premises. This includes the transport vehicle itself. In addition, livestock will have access to water in all holding pens and, if held longer than 24 hours, access to feed.

j. Ensure that any disabled livestock stunned without receiving antemortem inspection are humanely killed, condemned and disposed of in accordance with FSIS regulations.

k. Ensure that establishment personnel identify as "U.S. Suspect" (tag or tattoo) and segregate seriously crippled, disabled and downer livestock that need further observation before slaughter. "Suspects" will remain identified until antemortem and postmortem inspections, and proper dispositions have been made.

l. Ensure that "U.S. Rejected" tags are applied to any equipment, walkways, antemortem pens or other areas if their construction, maintenance or use contribute to the inhumane handling

of livestock. Tagged items, including transport vehicles, or areas will not be used and tags will not be removed by inspection program personnel until the establishment operator has provided satisfactory assurances that the situation will be corrected.

m. Inspection program personnel will stop slaughter operations whenever they observe a violation of the humane handling or slaughter regulations by an establishment employee.

2. Inspection program personnel will permit stunning and removal for slaughter of "U.S. Suspect" livestock that have passed antemortem inspection to prevent further suffering.

B. Antemortem Inspection On or Outside Transport Vehicles. Inspection program personnel will determine whether antemortem inspections on disabled livestock can be completely and thoroughly conducted. Inspection program personnel will also determine whether the antemortem inspection can be safely conducted.

C. Movement of Ambulatory Disabled Livestock. Inspection program personnel will ensure that establishment personnel avoid conditions that may cause livestock to slip or fall while in a walkway or chute.

D. Movement of Non-Ambulatory Disabled Livestock.

1. Inspection program personnel will ensure that, after livestock have been humanely removed

from the transport vehicles, sufficient establishment personnel use suitable equipment and restraints to move conscious non-ambulatory disabled livestock to the designated antemortem areas or pens in a humane manner.

2. The Veterinary Medical Officer should examine all disabled livestock, including "downers" and those that show signs of trauma, in designated antemortem areas or pens.

E. Notifications

Inspection program personnel will:

1. Notify establishment management of the reasons for taking action whenever a violation of humane handling, stunning or slaughter is observed and that the equipment or area where the incident occurred has been tagged as "U.S. Rejected." Inspection program personnel will remove tags and permit slaughter operations to resume if the situation is corrected by the establishment and assurances are received that it will not recur.

2. Refer any incident that is not resolved at the establishment level to the next higher level of FSIS supervision.

* * *

s/Margaret O'K. Glavin

Deputy Administrator
Office of Policy, Program Development
and Evaluation

UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
WASHINGTON, DC

FSIS DIRECTIVE	6900.2 Revision 1	11/25/03

Humane Handling and Slaughter of Livestock

PART I – GENERAL

I. PURPOSE

This directive informs inspection program personnel of the requirements, verification activities, and enforcement actions for ensuring that the handling and slaughter of livestock, including the slaughter of livestock by religious ritual methods is humane. This directive explains how inspection program personnel should approach these activities.

II. CANCELLATION

FSIS Directive 6900.2, dated 10/7/03

III. REASON FOR REISSUANCE

FSIS is reissuing this directive to provide additional clarification to the instructions in Part V, Ritual Slaughter of Livestock.

IV. REFERENCES

9 CFR parts 313 and 500, the Humane Methods of Slaughter Act – 7 U.S.C. 1901, 1902, and 1906, and FSIS Directive 6900.1 – Humane Handling of Disabled Livestock.

V. BACKGROUND

A. The Humane Methods of Slaughter Act of 1978 (HMSA) (Section 1901, 1902 and 1906, Attachment 1) states that the slaughtering and handling of livestock are to be carried out only by humane methods. In that Act, Congress determined (among other things) that the use of humane methods of handling and slaughtering livestock prevents needless suffering of animals and results in safer and better working conditions for employees in slaughter establishments.

B. Once a vehicle carrying livestock enters an official slaughter establishment's premises, the vehicle is considered to be a part of that establishment's premises. The animals within that vehicle are to be handled in accordance with 313.2.

PART II – VERIFICATION OF THE LIVESTOCK PENS, DRIVEWAYS, and RAMPS

A. What are the regulations related to livestock pens, driveways and ramps?

Section 313.1 states:

(a) Livestock pens, driveways and ramps shall be maintained in good repair. They shall be free from

sharp or protruding objects which may, in the opinion of the inspector, cause injury or pain to the animals. Loose boards, splintered or broken planking and unnecessary openings where the head, feet, or legs of an animal may be injured shall be repaired.

(b) Floors of livestock pens, ramps, and driveways shall be constructed and maintained so as to provide good footing for livestock. Slip resistant or waffled floor surfaces, cleated ramps and the use of sand, as appropriate, during winter months are examples of acceptable construction and maintenance.

(d) Livestock pens and driveways shall be so arranged that sharp corners and direction reversal of driven animals are minimized.

NOTE: Verification of compliance with 9 CFR 313.1(c) is addressed in FSIS Directive 6900.1, Humane Handling of Disabled Livestock.

B. How do inspection program personnel verify compliance with this regulation?

When verifying compliance with 9 CFR 313.1(a), (b), and (d), inspection program personnel should determine whether the pens, driveways, and ramps are designed and maintained to prevent injury or pain to the animals. To do this, inspection program personnel need to seek answers to questions such as:

1. Are pens free of loose boards or openings, so that the head, feet or legs of an animal will not be injured?

2. Are the floors of pens, ramps, and driveways constructed so that an animal is not likely to fall (e.g., cleated, waffled, use of sand)?

3. Are driveways arranged so that sharp turns or sudden reversals of direction are minimized, so that they are not likely to cause injury to the animals?

These questions are examples and are not an all-inclusive list.

C. What actions do inspection program personnel take if there is a noncompliance with 9 CFR 313.1?

If inspection program personnel observe a noncompliance with 9 CFR 313.1, they are to determine whether the situation does or will immediately lead to animal injury or inhumane treatment. If the noncompliance is such that it will not immediately lead to injury (e.g., a few loose boards), inspection program personnel are to take action as set out in Part VI A. If the noncompliance is such that an animal has been injured (e.g., an animal's leg falls in between boards), inspection program personnel are to take action as set out in Part VI B.

PART III – VERIFICATION OF HUMANE HANDLING OF LIVESTOCK

A. What is the regulation related to handling of livestock?

Section 313.2 states:

(a) Driving of livestock from the unloading ramps to the holding pens and from the holding pens to the stunning area shall be done with a minimum of excitement and discomfort to the animals. Livestock shall not be forced to move faster than a normal walking speed.

(b) Electric prods, canvas slappers, or other implements employed to drive animals shall be used as little as possible in order to minimize excitement and injury. Any use of such implements which, in the opinion of the inspector, is excessive, is prohibited. Electrical prods attached to AC house current shall be reduced by a transformer to the lowest effective voltage not to exceed 50 volts AC.

(c) Pipes, sharp or pointed objects, and other items which, in the opinion of the inspector, would cause injury or unnecessary pain to the animal shall not be used to drive livestock.

(d) Disabled livestock and other animals unable to move. (Also refer to FSIS Directive 6900.1, Humane Handling of Disabled Livestock).

(1) Disabled animals and other animals unable to move shall be separated from normal ambulatory animals and placed in the covered pen provided for in section 313.1(c).

(2) The dragging of disabled animals and other animals unable to move, while conscious, is prohibited. Stunned animals may, however, be dragged.

(3) Disabled animals and other animals unable to move may be moved, while conscious, on equipment suitable for such purposes; e.g., stone boats.

(e) Animals shall have access to water in all holding pens and, if held longer than 24 hours, access to feed. There shall be sufficient room in the holding pen for animals held overnight to lie down.

(f) Stunning methods approved in section 313.30 shall be effectively applied to animals prior to their being shackled, hoisted, thrown, cast or cut.

B. How do inspection program personnel verify compliance with these regulations?

When verifying compliance with 9 CFR 313.2, inspection program personnel should determine whether the handling of livestock is being done with a minimum of excitement and discomfort to the animals. Inspection program personnel will verify the moving of livestock, the availability of water and the handling of disabled livestock in the establishment.

To do this, inspection program personnel need to seek answers to questions such as:

1. Are animals driven from the unloading ramps to the holding pens with a minimum of excitement and not at a running pace?

2. Are electric prods and other implements used as little as possible to move animals within the establishment?

3. Are animals driven by using an object that would not cause unnecessary pain (e.g., not using a sharp object or pipe)?

4. Are disabled animals separated from ambulatory animals and placed in a covered pen?

5. Do the animals have access to water?

6. Is there sufficient room in the holding pens for animals that are held over night?

The above questions are examples and are not an all-inclusive list.

NOTE: Verification of compliance with 9 CFR 313.2(d) that deals specifically with disabled livestock, is also addressed in FSIS Directive 6900.1, Humane Handling of Disabled Livestock.

C. What actions do inspection program personnel take if there is a noncompliance with 9 CFR 313.2?

If inspection program personnel observe a noncompliance with 9 CFR 313.2, they are to determine whether the situation does or will immediately lead to animal injury or inhumane treatment. If the noncompliance can be immediately remedied (e.g., providing water to penned animals), inspection program personnel are to take the action as set out in Part VI A 1 and 2. If an immediate remedy is not forthcoming (e.g., the establishment fails to provide water immediately after being notified that animals do not have water available), inspection program personnel are to take the action as set out in Part VI A 3. If the noncompliance is resulting in the injury or inhumane treatment of animals (e.g., the dragging of disabled animals), inspection program personnel are to take action as set out in Part VI B.

PART IV – STUNNING METHODS

Appropriate stunning methods are required for an establishment to be in compliance with the HMSA. When stunning is done correctly, animals feel no pain, are rendered instantly unconscious, and remain unconscious until slaughtered. There are four methods of stunning approved for livestock. A summary of these approved stunning methods appear below (refer to 9 CFR sections 313.5, 313.15, 313.16 and 313.30).

A. What are the general regulatory requirements related to approved stunning methods?

Chemical; carbon dioxide

Regulatory requirements for the use of carbon dioxide as a humane method of slaughter are specified in section 313.5 and include, among other things, the following:

1) Carbon dioxide gas may be used to slaughter and handle sheep, calves and swine.

2) The carbon dioxide gas shall be administered in a chamber so as to produce surgical anesthesia (a state where an animal feels no painful sensation) before the animal is shackled, hoisted, thrown, cast, or cut. Animals shall be exposed to the carbon dioxide gas in a way that will accomplish the anesthesia quickly and calmly.

3) Gas concentrations and exposure times shall be graphically recorded throughout each day's operation.

4) It is necessary that the operator be skilled, attentive, and aware of his or her responsibility.

Mechanical; captive bolt

Regulatory requirements for the use of captive bolt stunners as a humane method of slaughter are specified in section 313.15 and include, among other things, the following:

1) Captive bolt stunners may be used to slaughter and handle sheep, swine, goats, calves, cattle, horses, mules, and other equines.

2) The captive bolt stunners shall be applied to livestock so as to produce immediate unconsciousness in the animals before they are shackled, hoisted, thrown, cast, or cut.

3) The stunning operation is an exacting procedure and requires a well-trained and experienced operator who must use the correct detonating charge with regard to kind, breed, size, age, and sex of the animal to produce the desired results.

4) Stunning instruments must be maintained in good repair.

Mechanical; gunshot

Regulatory requirements for the use of gunshot as a humane method of slaughter are specified in section 313.16 and include, among other things, the following:

1) Shooting by firearms may be used to slaughter and handle cattle, calves, sheep, swine, goats, horses, mules, and other equines.

2) A single shot delivery of a bullet or projectile into the animal is to produce immediate unconsciousness in the animal before it is shackled, hoisted, thrown, cast or cut.

3) Firearms must be maintained in good repair.

4) The shooting operation is an exacting procedure and requires a well-trained and experienced operator who must be able to accurately direct the projectile to produce immediate unconsciousness.

5) The operator must use the correct caliber firearm, powder charge and type of ammunition to produce instant unconsciousness in the animal.

Electrical; stunning or slaughtering with electric current

Regulatory requirements for the use of electric current as a humane method of slaughter are specified in section 313.30 and include, among other things, the following:

1) Electric current may be used to slaughter and handle swine, sheep, calves, cattle, and goats.

2) The animal shall be exposed to the electric current in a way that will accomplish surgical anesthesia (a state where an animal feels no painful sensation) quickly and effectively before they are shackled, hoisted, thrown, cast, or cut.

3) It is necessary that the operator of electric current application equipment be skilled, attentive, and aware of his or her responsibility.

4) Suitable timing, voltage and current control devices shall be used to ensure that each animal receives the necessary electrical charge to produce immediate unconsciousness.

B. How do inspection program personnel verify compliance with these regulations?

When verifying compliance with 9 CFR 313.5, 313.15, 313.16, and 313.30, inspection program personnel should assess the stunning method used for its effectiveness in rendering animals immediately unconscious and verify that animals are being properly stunned at the knocking box before hoisting. To do this, inspection program personnel need to seek answers to questions such as:

1. During stunning operations, is the establishment consistently rendering animals unconscious with a single application of the stunning methodology?

2. Is stunning equipment in good repair?

3. Are carbon dioxide gas concentrations graphically recorded throughout each day's stunning operation so that the correct amount of gas is used to adequately anesthetize an animal?

4. Is the captive bolt stunner accurately placed so that after it is applied the animal is immediately unconscious?

5. Is the correct caliber firearm being used to produce quick and complete unconsciousness in an animal?

6. Is the proper voltage of electric current being used so that the animal is quickly rendered unconscious?

NOTE: The above questions are examples and are not an all-inclusive list.

C. What actions do inspection program personnel take if there is a noncompliance with 9 CFR 313.5, 313.15, 313.16, or 313.30?

If inspection program personnel observe a noncompliance with 9 CFR 313.5, 313.15, 313.16, or 313.30, they are to determine whether the situation does or will immediately lead to animal injury or inhumane treatment. If the noncompliance is such that animals will not be injured or treated inhumanely (e.g., the gas concentration was not graphically recorded, but the establishment showed that the proper concentration was administered), inspection program personnel are to take an action as set out in Part VI A. If the noncompliance is resulting in the injury or inhumane treatment of animals (e.g., an animal is not properly rendered unconscious) inspection program personnel are to take action as set out in Part VI B.

* * *

s/Philip S. Derfler

Assistant Administrator
Office of Policy and Program Development

* * *

UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
WASHINGTON, DC

FSIS DIRECTIVE	6000.2 Revision 2	8/15/11

NOTE: DO NOT IMPLEMENT THIS DIRECTIVE UNTIL SEPTEMBER 15, 2011

HUMANE HANDLING AND SLAUGHTER OF LIVESTOCK

CHAPTER I – GENERAL

I. PURPOSE

A. This directive informs inspection program personnel (IPP) of the requirements, verification activities, and enforcement actions for ensuring that the handling and slaughter of livestock, including disabled livestock and livestock slaughtered by religious ritual methods, is humane. This directive provides instructions to IPP for conducting humane handling activities randomly throughout their tour of duty.

B. In addition, public health veterinarians (PHVs) are to notify establishments that they may choose to develop and implement a systematic approach for the humane handling of animals. On September 9, 2004, FSIS published a notice in the Federal Register (54 Fed. Reg. 54625) entitled "Humane Handling and Slaughter Requirements and the Merits of a

Systematic Approach To Meet Such Requirements." This Federal Register Notice details the background on the humane handling and slaughter statutes issued by Congress and regulation of humane handling by FSIS. It also details steps industry should take to assure effective compliance with the Acts and regulations. This Federal Register Notice can be found in its entirety at the following link: 2004 Federal Register Notice.

C. This directive provides instructions to IPP in establishments that assert that they have put in place a systematic approach on how to assess whether that approach is robust enough that IPP should allow it to function in the event of an egregious inhumane handling, or whether IPP should intervene in accordance with the relevant instructions in this directive.

II. CANCELLATION

FSIS Directive 6900.1, Humane Handling of Disabled Livestock, date 11/2/98

FSIS Directive 6900.2, Revision 1, Humane Handling and Slaughter of Livestock, dated 11/25/03

FSIS Notice 06-11, Humane Handling at All Entrances and the Twenty-eight Hour Law, dated 2/2/11

III. REASON FOR REISSUANCE

A. FSIS is reissuing this directive to:

1. Incorporate the instructions from FSIS Directive 6900.1 related to disabled livestock and FSIS Notice 06-11 related to the Humane Handling at All Entrances and the Animal and Plant Health Inspection Service (APHIS) Twenty-Eight Hour Law;

2. Provide a definition of "egregious inhumane handling" and detail the actions that IPP are to take when they find that egregious inhumane handling has occurred;

3. Provide IPP with verification instructions when an establishment has a written animal handling program that incorporates the guidelines in the Federal Register Notice to such an extent that establishment management believes the program rises to the level of a robust systematic approach for humane handling;

4. Provide instructions for IPP to verify that an establishment does not use any secondary entrances or equipment to handle livestock inhumanely or to violate the Humane Methods of Slaughter Act (HMSA) or the Federal Meat Inspection Act (FMIA) or any of the regulatory requirements on humane handling that FSIS has adopted pursuant thereto; and

5. Provide instructions for actions to take should IPP observe inhumane handling of animals being slaughtered under a Custom Exempt program.

B. There are no changes to the instructions in this directive that address Ritual Slaughter.

IV. REFERENCES

9 CFR parts 313 and 500; the HMSA – 7 U.S.C. 1901, 1902, and 1906; and the FMIA – 21 U.S.C. 603 and 610.

V. DEFINITIONS

A. Ambulatory Disabled Livestock: Livestock capable of walking but with physical impairment such as central nervous system signs, lameness, or similar conditions.

B. Egregious inhumane treatment: An egregious situation is any act or condition that results in severe harm to animals, for example:

1. Making cuts on or skinning conscious animals;

2. Excessive beating or prodding of ambulatory or nonambulatory disabled animals or dragging of conscious animals;

3. Driving animals off semi-trailers over a drop off without providing adequate unloading facilities (animals are falling to the ground);

4. Running equipment over conscious animals;

5. Stunning of animals and then allowing them to regain consciousness;

6. Multiple attempts, especially in the absence of immediate corrective measures, to stun an animal versus a single blow or shot that renders an animal immediately unconscious;

7. Dismembering conscious animals, for example, cutting off ears or removing feet;

8. Leaving disabled livestock exposed to adverse climate conditions while awaiting disposition, or

9. Otherwise causing unnecessary pain and suffering to animals, including situations on trucks.

C. Falls: When an animal loses an upright position suddenly, in which a part of the body other than the limbs touches the ground or floor.

D. Humane Handling: Handling and slaughter practices that cause a minimum of excitement, pain, injury, or discomfort to livestock.

E. Hoisting: The process whereby an animal after it is shackled, is raised, usually from a lying position, and suspended by a leg or legs.

F. Non-Ambulatory Disabled Livestock: Livestock that cannot rise from a recumbent position or that cannot walk, including, but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column, or metabolic conditions.

G. Shackling: Livestock are considered to be shackled when a device (e.g., rope, chain) used to shackle

the animal has been placed around the animal's leg, even if the device has not been drawn tight.

H. Slips: When a portion of the leg other than the foot touches the ground or floor, or a foot loses contact with the ground or floor in a non-walking manner.

I. Suitable Equipment: Establishment equipment that, in the opinion of IPP, is capable of enabling establishment personnel to move non-ambulatory disabled livestock with a minimum of excitement, pain, or injury. This type of equipment includes bobcat-type vehicles and self-propelled tractors capable of pulling stone boats (sleds) or similar conveyances, those conveyances themselves, holding chutes, and a voltmeter or other suitable equipment that is capable of verifying voltage of electric prods attached to AC current.

J. Suitable Restraints: Establishment-provided restraints that, in the opinion of IPP, are capable of effectively restraining livestock (including disabled livestock when necessary) and preventing injuries to Agency personnel when performing ante-mortem inspection. This includes inspections when conducted on a transport vehicle.

VI. BACKGROUND

The HMSA (7 U.S.C. 1901, 1902, and 1906, see Attachment 1) states that the slaughtering and handling of livestock are to be carried out only by humane methods. In this statute, Congress determined

(among other things) that the use of humane methods of handling and slaughtering livestock prevents needless suffering of animals and results in safer and better working conditions for employees in slaughter establishments. This includes:

1. Slaughtering in accordance with the ritual requirements of the Jewish faith or of any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering.

2. Using humane handling and slaughter practices for all livestock including non-ambulatory disabled livestock in accordance with the HMSA. See attachment 2 for FSIS humane handling regulations.

* * *

CHAPTER II – LIVESTOCK TRANSPORTATION VEHICLES AND THE TWENTY-EIGHT HOUR LAW

I. LIVESTOCK ON TRANSPORTATION VEHICLES

Once a vehicle carrying livestock enters, or is in line to enter, an official slaughter establishment's premises, the vehicle is considered to be a part of that establishment's premises. The animals within that vehicle are to be handled in accordance with 9 CFR 313.2. If, for whatever reason, animals cannot be

unloaded for ante-mortem inspection, IPP will determine whether ante-mortem inspections can be safely and adequately conducted from outside the vehicle or, at the IPP's option, by entering the vehicle.

II. TWENTY-EIGHT HOUR LAW

A. Under the Twenty-Eight Hour Law, transporters are required to stop to provide animals with food, water, and rest. Transporters who have deprived livestock of food, water, or rest for more than 28 hours are in violation of the Twenty-Eight Hour Law (49 USC 80502).

B. If livestock arriving on a transport vehicle appear exhausted or dehydrated, IPP are to ask establishment management whether the truck driver stopped within the preceding 28 hours to provide the animals rest, food, and water. If the truck driver or establishment is unwilling to provide information, or if IPP believe the condition of the animals could be the result of being deprived of rest, food, and water for over 28 hours, IPP are to contact the Animal and Plant Health Inspection Service (APHIS), Area Veterinarian-in-Charge, via their FSIS chain of command, so that APHIS can conduct an investigation.

C. A Memorandum of Interview (MOI) should be prepared to document what the IPP observed and all actions taken.

* * *

CHAPTER IV – HUMANE HANDLING VERIFICATION ACTIVITIES

I. HUMANE HANDLING ACTIVITIES TRACKING SYSTEM (HATS):

A. The electronic animal disposition reporting system (eADRS) database provides valuable information concerning animal diseases and welfare in the United States. HATS is one component of the eADRS.

B. The HATS component provides FSIS with data on the time that FSIS PHVs and other IPP spend verifying that specific humane handling and slaughter requirements are met. To the maximum extent possible, multiple IPP are routinely to conduct HATS related activities. IPP are to accurately and completely report the time that they spend on these activities and to separate that time into nine specific categories.

II. HATS CATEGORIES FOR VERIFICATION

A. Category I – Inclement Weather (9 CFR 313.1 and 313.2): Under this category, IPP record their verification of how the establishment adapts its facilities and handling practices to inclement weather to ensure the humane handling of animals.

B. Category II – Truck Unloading (9 CFR 313.1 and 313.2): Under this category, IPP record their verification of the establishment's humane handling procedures during livestock unloading activities.

C. Category III – Water and Feed Availability (9 CFR 313.2): Under this category, IPP record their verification of the establishment's compliance with 9 CFR 313.2(e), which requires that water be available to livestock in all holding pens, and that animals held longer than 24 hours have access to feed.

D. Category IV – Ante-mortem Inspection (9 CFR 313.1 and 313.2): Under this category, while IPP are conducting ante-mortem inspection, they are to record the time spent verifying the establishment's facilities and procedures for humanely handling animals during ante-mortem inspection.

E. Category V – Suspect and Disabled (9 CFR 313.1 and 313.2): Under this category, IPP record their verification of the measures that an establishment takes to ensure that "U.S. Suspect" and disabled livestock (9 CFR 313.2(d)) are handled humanely.

F. Category VI – Electric Prod/Alternative Object Use (9 CFR 313.2): Under this category, IPP record their verification of the establishment's procedures for humanely and effectively moving livestock without excessive prodding or the use of sharp objects after ante-mortem inspection has occurred (9 CFR 313.2).

G. Category VII – Slips and Falls (9 CFR 313.1 and 313.2): Under this category, IPP record time spent observing whether any animals are slipping and falling as they are handled and moved through the livestock facilities.

H. Category VIII – Stunning Effectiveness (9 CFR 313.5, 313.15, 313.16, and 313.30): Under this category, IPP record their verification of the establishment's procedures to appropriately and effectively administer stunning methods that produce unconsciousness in the animal before the animal is shackled, hoisted, thrown, cast, or stuck.

I. Category IX – Conscious Animals on the Rail (9 CFR 313.5, 313.15, 313.16, and 313.30): Under this category, IPP (usually a Public Health Veterinarian) record their verification that the establishment ensures that animals do not regain consciousness throughout shackling, sticking, and bleeding (Section 1902 of the HMSA). This category focuses specifically on the time after stunning and throughout the process of shackling, hoisting, sticking and bleeding of the animal.

III. VERIFICATION OF ESTABLISHMENT HUMANE HANDLING ACTIVITIES

A. PHVs and other trained IPP are to perform verification of the establishment's humane handling activities during each shift that animals are slaughtered, or when animals are on site, even if it is during a processing only shift. IPP are to vary the times during these shifts when they perform the verifications.

B. IPP are to perform this verification under Inspection System Procedure (ISP) code 04C02. This code

should only be entered in Performance Based Inspection System (PBIS) one time per slaughter shift.

NOTE: FSIS will issue instructions related to the Public Health Inspection System (PHIS) at a later date.

C. On each occurrence of ante-mortem inspection, IPP are to make verification observations as described for HATS Category IV – "Ante-Mortem Inspection;" except in very small establishments (see D. below), it is expected that there will be an entry of at least one-quarter hour in HATS Category IV for every slaughter shift.

D. Although IPP in very small establishments will perform ante-mortem inspection every slaughter shift, there are special instructions for documenting their HATS activities (see Chapter VI. B. Documentation of HATS Time and PBIS Entries for exceptions in very small establishments).

E. In addition to the daily verification of HATS Category IV, IPP are to verify one or more other HATS category during each slaughter shift.

F. IPP are to record the total time spent verifying HATS categories. IPP are to record this time in quarter hour increments rounding up to next the quarter hour. For example, if IPP spend 20 minutes verifying HATS categories, they would record 2 quarter hour increments (i.e., 30 minutes).

G. Over time, IPP are to ensure that they routinely verify all HATS categories. IPP are to focus on complete quality verifications of each category.

H. If the establishment participates in the Agriculture Marketing Service (AMS) National School Lunch Program (NSLP), IPP are to determine whether the establishment is meeting AMS Animal Welfare Requirements as set forth in the most current version of the AMS "Technical Requirements Schedule – Animal Handling and Welfare" (TRS-AHW). This determination would include a review of all humane handling records generated in accordance with this program.

NOTE: AMS and FSIS IPP access to all relevant documents is required by the AMS AHW program. If the IPP have reason to believe that the establishment is not fully following its quality control related humane handling obligations under the AMS NSLP, he or she should notify his/her immediate supervisor and the District Veterinary Medical Specialist (DVMS). As deemed necessary, the DVMS will contact the Contracting Officer at the AMS, Livestock and Seed Program, Commodity Procurement Branch, Room 2610-S, Washington, D.C., (202) 720-2650. Use the following link for access to the most current AMS AHW program requirements: http://www.ams.usda.gov/AMSv1.0/ then type "TRS-AHW" in the Search box and select the most current update of the TRS-AHW from the generated listing.

I. For establishments with an animal handing program that effects a robust systematic approach, IPP,

as a part of performing their daily HATS procedures, are to verify through observation the establishment employees during the handling and slaughter of animals or document reviews that the establishment is following its animal handling program, and that it is implementing effective corrective actions when appropriate.

J. If an establishment claims to have implemented a robust systematic approach, but IPP observe that the establishment is not following the written animal handling program, IPP are to first discuss their observations with establishment management and document this discussion on an MOI. If IPP continue to observe ineffective implementation of the animal handling program, they are to notify the DO (DVMS or DDMs if the DVMS position is vacant) and their immediate supervisor of their concerns by email, which will serve as documentation of the IPP's concerns.

* * *

CHAPTER V – VERIFICATION OF HUMANE HANDLING USING HATS CATEGORIES AND DETERMINING NONCOMPLIANCE

I. GENERAL

To assist IPP in implementing HATS, the following sections group HATS categories by the matters that they address, cite the humane handling regulations that support the verification category, specify the activities that IPP are to perform in verifying that category, and describe what would constitute

noncompliance. Also, these sections provide examples of establishment procedures and documents that IPP might expect to observe and review at those establishments where establishment management has stated that it believes it has developed and implemented a written animal handling program that effectively addresses the four steps of a systematic approach and should be considered robust.

II. ESTABLISHMENT'S LIVESTOCK PENS, DRIVEWAYS, AND RAMPS (9 CFR 313.1) HATS CATEGORIES I, II, IV, AND, VII

A. Category I – "Inclement Weather": Disabled livestock and U.S. Suspects, when present, are to be placed in a covered pen (9 CFR 313.1(c) and 313.2(d)(1)) to protect them from adverse climatic conditions.

1. IPP are to verify how the establishment adapts its facilities and holding practices to inclement weather to ensure the humane handling of animals.

NOTE: There is no requirement for a dedicated covered pen; this section can be met if the establishment can show they can and will provide a covered area when needed.

2. IPP are to document noncompliance as set out in Chapter VII if US Suspect or disabled livestock are not placed in a covered pen.

B. Category II – "Truck Unloading": Unloading facilities, such as ramps, chutes, floors, and vehicles,

are to be maintained in good repair (9 CFR 313.1(a)). Vehicles and ramps are to be properly positioned for unloading animals (9 CFR 313.1(b)).

1. IPP are to verify that the establishment's livestock handling facilities are in proper repair during livestock unloading activities.

2. IPP are to document noncompliance as set out in Chapter VII if:

a. The condition of the facilities appear likely to injure or are injuring animals; or

b. Vehicles or ramps are not properly positioned leading to the injury of animals.

C. Category IV "Handling During Ante-Mortem Inspection": Pens, floors, and driveways, including entrances and exits, are to be maintained in good repair (9 CFR 313.1).

1. IPP are to verify the establishment's facilities for humanely handling livestock during ante-mortem inspection of livestock.

2. IPP are to document noncompliance as set out in Chapter VII if facilities are not maintained in good repair or may otherwise lead to animal injury.

D. Category VII – "Observations for Slips and Falls": Establishments are to provide adequate footing in their livestock facilities (9 CFR 313.1(b)).

1. IPP are to verify that the establishment prevents livestock from slipping and falling due to inadequate footing or improper handling practices.

2. IPP are to take appropriate actions and document noncompliance as set out in Chapter VII if animals are slipping and falling because of poor footing or lack of slip resistant flooring.

III. ESTABLISHMENT'S LIVESTOCK HANDLING PRACTICES (9 CFR 313.2) HATS CATEGORIES I, II, III, IV, V, VI, and VII.

A. Category I – "Adequate Measures for Inclement Weather": Inclement weather (e.g., rain, heat, snow, ice) can have adverse effects on facilities and animal handling. Animals may slip or fall because of wet floor conditions or because of the build up snow and ice. Animals may not have access to water when water buckets or troughs freeze over.

1. IPP are to verify how the establishment adapts its facilities and handling practices to inclement weather to ensure that animals are humanely handled.

2. IPP are to take appropriate actions and document noncompliance as set out in Chapter VII if:

a. Livestock do not have access to water in holding pens (9 CFR 313.2(e)); or

b. Livestock are overheated because of a lack of proper shade or because of a lack of water for cooling.

B. Category II – "Truck Unloading": Animals are unloaded and driven to pens with a minimum of excitement and prod use (9 CFR 313.2(a) and (b)). The unloading and "penning" of disabled animals is handled in strict accordance with 9 CFR 313.2(d). Animals are not to be forced to move faster than a normal walking speed (9 CFR 313.2(a)).

1. IPP are to verify the establishment's humane handling procedures during livestock unloading activities.

2. IPP are to take appropriate actions and document noncompliance as set out in Chapter VII if:

a. Animals are forced to move faster then a normal walking speed;

b. Animals are slipping and falling;

c. Disabled or U.S. Suspect animals are not separated from normal ambulatory animals; or

d. During unloading and driving, animals are excessively prodded or not driven with a minimum of excitement and discomfort.

NOTE: Special mention is made here about the handling of "fatigued" or "slow" hogs. These "slow" hogs will not be able to move at the same normal walking speed as others in the lot and tend to lie down and in some cases may get knocked down by

others in the lot. These hogs (though ambulatory and otherwise normal, bright, and alert) may need to be moved in a manner that protects them from other hogs in the group or lot. Therefore, establishments will need to develop a method or protocol for humanely handling these hogs.

C. Category III – "Water and Feed Availability": 9 CFR 313.2(e) states that water is to be accessible to livestock at all times in holding pens, and that feed is to be accessible after livestock have been held longer then 24 hours.

1. IPP are to verify the accessibility of water and feed to livestock.

2. IPP are to document noncompliance as set out in Chapter VII if:

a. Water is not accessible to livestock in holding pens; or

b. Food has not been provided to livestock being held for longer than 24 hours.

D. Category IV – "Handling During Ante-mortem Inspection": Livestock are to be moved calmly and with a minimum of excitement during ante-mortem inspection (9 CFR 313.2(a)) which includes minimal use of electric prods (9 CFR 313.2(b)). Livestock are to be moved no faster then [sic] a normal walking speed (9 CFR 313.2(a)).

1. IPP are to verify the establishment's procedures for humanely handling livestock during antemortem inspection of livestock.

2. IPP are [to] take appropriate actions and document noncompliance as set out in Chapter VII if:

a. Livestock are excessively prodded with an electric prod;

b. Livestock are injured because of handling practices; or

c. Livestock are moved faster than a normal walking speed.

E. Category V – "Handling of Suspect and Disabled": Animals unable to move may be moved while conscious using suitable equipment (9 CFR 313.2(d)(3)). Dragging of conscious animals is prohibited (9 CFR 313.2(d)(2)).

1. IPP are to verify that the establishment handles US Suspect and disabled livestock humanely. In establishments that present higher numbers of disabled livestock, IPP would typically spend more time verifying the humane handling of these animals compared to establishments that present few disabled livestock.

2. IPP are to take appropriate actions and document noncompliance as set out in Chapter VII if:

a. Conscious animals are dragged; and

b. Disabled animals are not separated from normal ambulatory animals.

F. Category VI – "Electric Prod/Alternative Object Use": Establishments are required to move livestock with a minimum of excitement and discomfort (9 CFR 313.2(a)). Implements (including electric prods) are to be used as little as possible in order to minimize excitement and injury. Any use of such implements that, in the opinion of the inspector, is excessive is prohibited (9 CFR 313.2(b), 31[3].5(a)(2), 313.16(a)(2), and 313.30(a)(2), as applicable).

1. IPP are to verify that the establishment humanely and effectively moves livestock without excessive prodding or the use of sharp objects. This procedure includes direct observation at multiple locations (e.g., pens, alleyways, single-file chutes, stunning areas) involving animal movement.

2. IPP are to take appropriate actions and document noncompliance as set out in Chapter VII if livestock are being prodded excessively causing them to become overexcited or injured.

* * *

CHAPTER VII – ENFORCEMENT AND DOCUMENTATION OF NONCOMPLIANCE

* * *

II. NONCOMPLIANCES WITHOUT INJURY TO ANIMALS

A. There are noncompliances with 9 CFR Part 313 that IPP are to act upon even though the noncompliances are not causing animals to be injured, to be in pain, or to be under excessive excitement or discomfort (e.g., forcing animals to move faster than a normal walking speed).

B. As required by 9 CFR 313.50, IPP are to inform establishment management of such noncompliances. As 9 CFR 313.50 states: "When an inspector observes an incident of inhumane slaughter or handling in connection with slaughter, he/she shall inform the establishment operator of the incident and request that the operator take the necessary steps to prevent a recurrence."

C. IPP are to document the noncompliance on an NR, under the Inspection System Procedure (ISP) code 04C02, using the "Protocol" trend indicator.

D. IPP are to specify all relevant regulations that pertain to the incident, provide a concise description of the noncompliances, and provide any other evidence that supports the determination that a noncompliance has occurred.

E. IPP are to indicate at the top of Block 10 of the NR which category of activity under HATS was being

performed when they found the noncompliance. If the noncompliance is covered by a second HATS category as well, then IPP are to note both categories on the NR. If two categories are covered, IPP are to list the category where the noncompliance occurred first.

F. IPP are to verify that the establishment takes the necessary corrective actions and further preventive measures to achieve regulatory compliance and prevent recurrence. IPP are to take a regulatory control action if:

1. Establishment management fails to take such actions or to promptly provide the inspector with satisfactory assurances that such actions will be taken; or

2. A subsequent noncompliance is observed that derives from the same or related cause, thereby indicating a failure to continue effective implementation of previously proffered corrective and preventative measures.

G. IPP are to take a regulatory control action in accordance with 9 CFR 500.2(a)(4) and as specified in 9 CFR 313.50(a), (b), or (c). When a regulatory control action is taken in response to inhumane handling because of employee actions, when placing the tag IPP may take into consideration whether, by applying the tag at a point that is more specific to the location or nature of the violation, the intent of 9 CFR 313.50(b) will be met, i.e., control the situation and prevent injury, pain or excessive excitement or discomfort to animals. The regulatory control action

will remain in place until the establishment implements the appropriate corrective actions and further preventive measures that ensure compliance with the appropriate section of 9 CFR part 313.

H. If the establishment continues to have noncompliances or does not adequately correct a noncompliance of the aforementioned nature, the IIC is to communicate this first to the FLS and DVMS to determine whether an NOIE should be issued for continued noncompliance.

III. INHUMANE SLAUGHTER OR HANDLING TREATMENT CAUSING INJURY OR DISTRESS BUT NOT OF AN EGREGIOUS NATURE

A. Non-egregious inhumane slaughter or handling can lead to animals being injured, to unnecessary pain, or to excessive excitement or discomfort (e.g., driving animals too fast and causing a few to slip and fall) and is a noncompliance with appropriate sections of 9 CFR 313.

B. IPP are to follow 9 CFR 313.50 and inform establishment management of the noncompliance by issuing a non-compliance record: "When an inspector observes an incident of inhumane slaughter or handling in connection with slaughter, he or she shall inform the establishment operator of the incident and request that the operator take the necessary steps to prevent a recurrence." If necessary, IPP are to take a regulatory control action:

1. Before informing the establishment management, when it is necessary for FSIS, rather than establishment management, to stop the inhumane treatment of livestock because the noncompliance continues to injure, cause distress, or otherwise adversely affect livestock; or

2. When the establishment operator fails to take action or fails to promptly provide the inspector with satisfactory assurances that such action will be taken.

C. The application of the regulatory control action is to follow the procedures as specified in 9 CFR 313.50. IPP are to take a regulatory control action as indicated in 9 CFR 500.2(a)(4) and as specified in 9 CFR 313.50(a), (b), or (c). When a regulatory control action is taken in response to inhumane handling because of employee actions, when placing the tag IPP may take into consideration whether, by applying the tag at a point that is more specific to the location or nature of the violation, the intent of 9 CFR 313.50(b) will be met, i.e., control the situation and prevent further injury or distress to animals. The regulatory control action is to remain in place until the establishment implements the appropriate corrective actions and preventive measures that ensure compliance with the appropriate section of 9 CFR part 313.

D. IPP are to document the noncompliance on FSIS Form 5400-4, Noncompliance Record (NR), under the ISP code 04C02 using the "Protocol" trend indicator.

E. IPP are to specify all relevant regulations that pertain to the incident, provide a concise description of the noncompliance, and provide any other evidence that supports the determination that a noncompliance has occurred.

F. IPP are to indicate at the top of Block 10 of the NR which category of activity under HATS they were performing when they found the noncompliance. If the noncompliance is covered by a second HATS category as well, then IPP are to note both categories on the NR. If two categories are covered, IPP are to list the category where the noncompliance occurred first.

G. IPP are to verify that the establishment takes the appropriate corrective or preventive actions before removing the regulatory control action.

H. If the establishment continues to have noncompliances or does not adequately correct the noncompliances of the aforementioned nature, the IIC is to communicate this to the FLS and DVMS to determine if an NOIE should be issued for continued noncompliances.

IV. INHUMANE SLAUGHTER OR HANDLING TREATMENT OF AN EGREGIOUS NATURE

A. The IIC is to immediately stop the inhumane slaughter or handling of livestock that is of an egregious nature with an appropriate regulatory control action to prevent the inhumane handling and

slaughter from continuing. The IIC will then orally notify the establishment management that he/she is correlating with the FLS, DO, and DVMS to discuss and recommend that a suspension action be taken according to 9 CFR 500.3(b) (see C and D below for exceptions to taking or delaying suspension action).

B. The IIC is to document the facts that serve as the basis of the enforcement action on a memorandum of interview (MOI) and promptly provide that information electronically to the FLS, DO and DVMS for their use in documenting the enforcement action. (See Attachment 3, for an example MOI that supports a suspension action.)

C. However, in a situation where an establishment:

a. Does not have any recent humane handling related enforcement actions;

b. Has consistently been meeting the humane handling regulatory requirements;

c. Has been operating under a written animal handling program that establishment management has proffered as a robust systematic approach and made accessible to IPP; and

d. Has demonstrated the robustness of the program to IPP by effectively and consistently implementing all aspects of its program, the IIC, based on consideration of the above, may recommend in an MOI to the FLS, DO, and DVMS that the egregious act be subject to enforcement discretion and recommend issuance a Notice of Intended Enforcement

(NOIE) rather than a notice of suspension (See attachment 4 for a sample MOI). The decision to recommend this enforcement action is based on the Rules of Practice regulation (9 CFR 500.3(b)) that states: "FSIS also *may* impose a suspension without providing the establishment prior notification because the establishment is handling or slaughtering animals inhumanely." In determining whether the egregious act is an anomaly, and whether the establishment should be allowed to continue to operate, the IIC, FLS, DO, and DVMS are to consider:

1. Whether the establishment is operating under an animal handling program that provides for how the establishment will respond if an unforeseeable event of this type occurs;

2. Whether there is any basis for concern that the planned response in the establishment's animal handling program will not effectively address the problem; and

3. Whether the establishment has consistently and effectively implemented their animal handling program over time.

NOTE: The PHV is to communicate that an NOIE will be issued as soon as that decision is made. The District Office is to issue the NOIE to the establishment typically within 24 hours.

D. In situations where the establishment has no written animal handling program, or IPP have not determined that the establishment has implemented a robust systematic approach, and where an

immediate suspension action would be warranted but is likely to result in inhumane treatment of additional animals (e.g., a line stoppage that may result in animals having to stay on a truck during an extremely hot day), the IIC may delay implementation of the suspension action until he/she can ensure that animals on-site or in-transit have been handled humanely.

1. In deciding whether to delay implementation of a suspension, the IIC is to consider:

a. What immediate corrective action the establishment is taking?

b. How likely is it, given the establishment's history, that the corrective action will be effective in preventing a recurrence of the root cause of the situation?

c. How many animals are on premises or enroute that will need to be slaughtered?

d. What conditions threaten the welfare of the animals if they are not promptly slaughtered?

NOTE: The IIC should encourage establishment management to redirect as many animals that are enroute as possible, per provisions in existing Good Manufacturing Practices (GMPs) for other emergency stoppages (e.g., major mechanical breakdowns, flooding) and to order the stoppage of further loading of animals onto trucks at the source location.

2. The IIC is to consult with the DO to inform it of the need to delay the implementation of the suspension action.

3. In this situation, the IIC will need to move a line inspector that is trained in humane handling to an appropriate area to directly observe establishment employees handling or slaughtering animals and decrease the line speed according to staffing standards in 9 CFR 310.1.

4. The IIC may allow slaughter to continue at a reduced line speed for a limited time on her or his own authority. It is not the intent of this section to provide for a "kill-out" but only for a "kill-down" to ensure that the number of animals to be held on-site meets the requirements in 9 CFR 313.2(e) for holding animals overnight. Any concerns IPP may have about allowing slaughter to continue at reduced line speeds are to be addressed through their supervisory chain for resolution.

5. The IIC is to promptly effect the suspension once he or she determines that animals will not be further subjected to inhumane handling.

6. IICs are to document their observations and actions in an MOI and submit it to the DO.

* * *

s/Daniel Sugeljohn

Assistant Administrator
Office of Policy and Program Development

* * *

RESPONDENT'S BRIEF

FILED
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No. 10-224

In The Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

KAMALA D. HARRIS, In Her Official Capacity as Attorney General of California; EDMUND G. BROWN JR., In His Official Capacity as Governor of California; STATE OF CALIFORNIA; THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether California's prohibition against slaughterhouses, stockyards, auctions, market agencies and dealers buying, selling, receiving, processing, or butchering nonambulatory swine for human consumption is preempted by the Federal Meat Inspection Act, which regulates certain aspects of the meat inspection process.

LIST OF PARTIES

Petitioner who was the plaintiff/appellee below is accurately listed in Petitioner's brief. Due to changes in state officers and pursuant to Rule 35.3 of the Supreme Court Rules, respondents for the state who were defendants/appellants below, are now Attorney General of California Kamala D. Harris (formerly Edmund G. Brown Jr.) and Governor of California Edmund G. Brown Jr. (formerly Arnold Schwarzenegger). The Humane Society of the United States; Farm Sanctuary, Inc.; Humane Farming Association; and Animal Legal Defense Fund intervened as defendants and are respondents in this Court. The American Meat Institute intervened as a plaintiff in the trial court, but was not a party to the appeal to the Ninth Circuit, and is not a party in this Court.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Supremacy Clause of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

As amended, California Penal Code section 599f (Section 599f) provides:

> § 599f. Purchase or sale of nonambulatory animal by slaughterhouse, stockyard, auction or market agency
>
> (a) No slaughterhouse, stockyard, auction, market agency, or dealer shall buy, sell, or receive a nonambulatory animal.
>
> (b) No slaughterhouse shall process, butcher, or sell meat or products of nonambulatory animals for human consumption.
>
> (c) No slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.

(d) No stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

(e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

(f) No person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

(g) No person shall accept a nonambulatory animal for transport or delivery to a slaughterhouse, stockyard, auction, market agency, or dealer.

(h) A violation of this section is subject to imprisonment in the county jail for a period not to exceed one year, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and imprisonment.

(i) As used in this section, "nonambulatory" means unable to stand and walk without assistance.

(j) As used in this section, "animal" means live cattle, swine, sheep, or goats.

> (k) As used in this section, "humanely euthanized" means to kill by a mechanical, chemical, or electrical method that rapidly and effectively renders the animal insensitive to pain.

The Federal Meat Inspection Act (FMIA), 21 U.S.C. §§ 601 *et seq.*, states in pertinent part:

> Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter [21 USCS §§ 601 et seq.], which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose record keeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State. . . . with respect to articles prepared at any establishment under inspection with the requirements under subchapter I of this chapter. . . . This chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this chapter, with respect to any other matters regulated under this Act.

21 U.S.C. § 678 (West 1999).

The Congressional Statement of Findings for the Federal Meat Inspection Act provides:

> It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. . . . regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

21 U.S.C. § 602.

Additionally, the purpose of the Federal Meat Inspection Act is described as follows:

> For the purpose of preventing the use in commerce of meat and meat food products which are adulterated, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all amenable species before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in commerce; and all amenable species found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other amenable species, and when so

> slaughtered the carcasses of said amenable species shall be subject to a careful examination and inspection, all as provided by the rules and regulations to be prescribed by the Secretary. . . .

21 U.S.C. § 603.

STATEMENT

1. In January 2008, the Humane Society of the United States released an undercover video of a California slaughterhouse; the video depicted images of sick and disabled cows ("downer" or "non-ambulatory" animals) being dragged by forklifts, kicked and electro-shocked on their way to being slaughtered. Petition for Certiorari Appendix (Pet. App.) A at 4a; also Joint Appendix (JA) at 57-58 (Bill Analysis including author Assembly member Paul Krekorian's statement in favor of Assembly Bill 2098). Upon further investigation, it was discovered that the meat from these cows had been processed and had entered the food supply. JA at 58. After the video's release, the largest beef product recall in the history of the United States was ordered to address the "risks posed by this meat that has been deemed by the USDA as unfit for consumption." *Id.*

In 2008, following the beef product recall, the California Legislature amended existing California law governing slaughterhouses, to prevent similar events in the future. Specifically, Assembly Bill 2098

prohibited purchasing, selling, receiving, processing, or butchering "nonambulatory" or "downer" pigs, sheep, goats and cattle. The law required that stockyards, auctions, market agencies, dealers, and slaughterhouses must take action to immediately euthanize nonambulatory animals.

The bill's author noted that "Public health professionals have long warned that meat derived from downed animals has a much increased susceptibility to passing on the E. coli virus, mad cow disease, and salmonella – all of which can lead to severe human health complications and even death." JA at 58. As the Ninth Circuit later noted, "downer" cows are more likely to be diseased, "partly because animals can become nonambulatory due to disease and partly because downer animals grow sicker as they end up rolling around in other animals' refuse." Pet. App. At 4a. One hundred forty-three million pounds of beef had been processed and sold by the California plant that triggered the recall, and 37 million pounds of that beef had been distributed to school lunch programs. JA at 58. Assembly Bill 2098 amended the California Penal Code by prohibiting the purchase, slaughter, and sale of nonambulatory animals for consumption and provided that a violation of these prohibitions would be punishable by imprisonment for up to a year and a fine of no more than $20,000. *Id.*; *see also* Cal. Penal Code § 599f (2009).

The purpose of Assembly Bill 2098 was to better protect human health and to prevent the inhumane treatment of downed animals. JA at 32-33, 55-62,

68-69. The legislation was supported by the United States Humane Society, the California District Attorneys Association, and the California Cattleman's Association, and there was no registered opposition. *Id.* at 62, 74. Petitioner did not oppose the statute. *Id.* The bill was signed into law on July 22, 2008 and became effective January 1, 2009.

The Federal Meat Inspection Act (FMIA) was enacted by Congress to protect the health and welfare of consumers by assuring that meat and meat food products are wholesome and not adulterated. 21 U.S.C. § 602. The FMIA sets forth inspection and examination requirements for animals that will be slaughtered for human consumption. 21 U.S.C. §§ 602-603. Congress expressed its intent to preempt a narrow category of state actions that seek to regulate the premises, facilities and operations of slaughterhouses:

> Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State. . . .

21 U.S.C. § 678. Congress' intent that this language be applied narrowly is confirmed by "savings clause" language which provides that states regulate "other matters" so long as the requirements are "consistent with this chapter." *Id.*

The FMIA is administered by the United States Department of Agriculture (USDA) through the Food Safety and Inspection Services (FSIS). 21 U.S.C. §§ 601, 603; 9 C.F.R. 300.2. Under the FMIA, federal personnel conduct an "ante-mortem inspection" of the animals before they are slaughtered for human consumption. 21 U.S.C. § 603(a). If "offered for slaughter," an animal may be (1) passed for slaughter, (2) identified as "suspect" or (3) condemned. 9 C.F.R. §§ 301.2, 309.2. If an establishment does not present animals for ante-mortem inspection, for whatever reason, the federal inspectors on post-mortem inspection "are not able to determine that carcasses are not adulterated and, therefore, cannot permit the carcasses to be marked as 'inspected and passed.'" FSIS Directive 6100.1, Revision 1 (Apr. 16, 2009) at V, 2.

2. On December 23, 2008, petitioner filed a complaint for declaratory and injunctive relief seeking to establish that (1) Section 599f, as it applies to swine and the processing of pork, is preempted by the FMIA; (2) Section 599f is unconstitutional because it violates the Commerce Clause of the U.S. Constitution; and (3) Section 599f is void for vagueness under the Fourteenth Amendment. JA at 1. At the same time, petitioner filed a motion for a preliminary injunction, and on December 30, 2008, petitioner amended the motion for a preliminary injunction. JA

at 1-2.[1] State Respondents opposed the entirety of petitioner's motion.[2] JA at 3.

On February 19, 2009, the trial court granted petitioner's motion for a preliminary injunction, finding that the FMIA preempted Section 599f, both expressly and by implication. Pet. App. B at 18a-53a. The trial court recognized that the public interest advanced by the challenged law – protecting the quality and quantity of meat entering the food supply – was "significant." JA at 49-50. "California's interest is in ensuring that the meat supply is not tainted by diseased or potentially diseased animals. . . . [D]owned animals have been shown to have increased risk of carrying disease. California has a significant interest in ensuring the health of its citizens from properly handled and slaughtered animals." Pet. App. at 49a-50a. Nonetheless, the court determined that the risk of harm is minimized by the FMIA. *Id.* The court also determined that although it did not have before it evidence to determine whether the reduction in the quantity of meat in and of itself was significant, "the evidence establishes that some reduction in the food supply will occur. . . . Reducing the quantity

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[1] American Meat Institute successfully intervened as a plaintiff, but did not join in or file a motion for preliminary injunction and is not a party to this appeal.

[2] The Humane Society of the United States; Farm Sanctuary, Inc.; Humane Farming Association; and the Animal Legal Defense Fund successfully intervened as defendants. They opposed the preliminary injunction motion as well. JA at 2-3.

of the food supply is a substantial factor warranting enjoining enforcement of Section 599f." Pet. App. at 50a-51a. The court recognized that the inhumane treatment of animals is a significant risk, but determined that the FMIA provides for the humane treatment of animals. JA 51a-52a.

3. The Ninth Circuit reversed the trial court and found that there was no likelihood that petitioner would succeed on its express preemption claim. Pet. App. A at 9a, 17a. As recited by the court, regulations pursuant to the FMIA require nonambulatory animals to be classified as "U.S. Suspect" and held for further examination. *Id.* at 8a; *see also* 9 C.F.R. § 309.2(b). If the downer animal shows signs of certain diseases, it must be classified as "U.S. Condemned," and disposed of according to specific procedures. *Id.*; *see also* §§ 309.3, 309.4-309.18. But, if the animal passes all required inspection, the federal regulations do not prohibit the slaughter and sale of nonambulatory animals for human consumption. *Id.*; *see also* § 309.2.

The Court of Appeals noted that the FMIA contains an express preemption provision (21 U.S.C. § 678),[3] but that provision "explicitly preserves for the

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[3] "Requirements within the scope of this chapter with respect to *premises, facilities and operations* of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State. . . ." 21 U.S.C. § 678 (emphasis added).

states broad authority to regulate slaughterhouses: 'This chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.' 21 U.S.C. § 678." Pet. App. at 8a-9a.

The Ninth Circuit found that there was no express preemption because while section 678 of the FMIA preempts state regulation of the "premises, facilities and operations" of slaughterhouses, Section 599f(a)-(c) does not address these categories, but instead regulates the kind of animal that may be slaughtered. *Id.* at 9a.

The Ninth Circuit found that "California's prohibition of the slaughter of nonambulatory animals does not duplicate federal procedures; it withdraws from slaughter animals that are unable to walk to their death. This prohibition doesn't require *any* additional or different inspections than does the FMIA, and is thus not a regulation of the 'premises, facilities and operations' of slaughterhouses. There is no express preemption here." Pet. App. at 11a.

Additionally, the Ninth Circuit determined that petitioner would likely not succeed on its claim that section 599f's ban on the receipt and slaughter of nonambulatory animals was preempted by implication. Pet. App. at 11a. Critical to the court's analysis was the statement in section 678 that "[t]his chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with

this chapter, with respect to any other matters regulated under this chapter." *Id.* at 12a. The court found that this language "shows that Congress did not intend to occupy the field of slaughterhouse regulation, so only conflict preemption is at issue." *Id.*

The court found that it was physically possible to comply with both Section 599f and the FMIA. *Id.* FMIA inspection requirements apply to animals that will be slaughtered for human consumption, but nothing in the FMIA requires the slaughter of downer animals for human consumption. *Id.* "Federal regulations require inspection *if* downer animals are to be slaughtered." *Id.* Accordingly, the court found that Section 599f was not an obstacle to accomplishing the purposes of the FMIA. The purpose of the FMIA, as noted by the court, is to protect the health and welfare of consumers "'by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged.'" *Id.* (quoting 21 U.S.C. § 602). The purpose of the FMIA "is not to preserve the slaughter of any kind of animal for human consumption." *Id.* at 13a-14a. Nor did Congress establish an unlimited choice of what kinds of animals to slaughter for individual slaughterhouses. *Id.* at 14a.

The court determined that nothing in Section 599f serves as an obstacle to the FMIA. *Id.* Nothing in the record suggests that the requirements of Section 599f "were so onerous and confusing that it put slaughterhouse compliance with federal inspection standards

at risk." *Id.* The court rejected petitioner's argument that Section 599f "will prevent the examination of downer animals for disease, hindering federal procedures designed to identify and stem the spread of disease" because nothing in the record substantiated this concern. *Id.* at 15a n.7.

The court did find that one provision, Section 599f(e) was likely preempted because it prohibits conduct – dragging unconscious downer animals – that federal law does not. *Id.* at 15a. Additionally, the FMIA deems more equipment suitable for moving downer animals – such as electric prods – than does Section 599f(e). However, at the preliminary injunction stage "[Petitioner] NMA failed to offer any evidence on [the issue of irreparable injury]" with respect to Section 599f(e) and did not show that the balance of equities and the public interest tipped in its favor as to this provision. Pet. App. 17a.

The court vacated the district court's injunction with the instruction that its decision did not preclude the entry of a preliminary injunction as to Section 599f(e) after appropriate findings or a preliminary injunction based on petitioner's vagueness and dormant Commerce Clause arguments. Pet. App. at 6a n.2, 17a.

SUMMARY OF ARGUMENT

The FMIA does not expressly or impliedly preempt[4] Section 599f. To the contrary, Congress has expressly invited state regulation in this area on "other matters" that are consistent with federal law. 21 U.S.C. § 678. The challenge to Section 599f is very narrow – petitioner challenges the portions of Section 599f applicable only to federal slaughterhouses, and not the provisions applicable to stockyards, auctions, market agencies, or dealers or the purchase and sale of animals not on slaughterhouse premises. Only the slaughterhouse provisions of Section 599f(a), (b), and (c) are at issue.

Petitioner's argument that Section 599f is a "requirement" with respect to slaughterhouse "operations" that are "within the scope [of the FMIA] blurs the distinction between "operations" and "other matters." The definition of "operations" used by petitioner is so broad that it would encompass every activity on the slaughterhouse floor – whether or not the activity is related to the FMIA purview of inspection and examination of animals for human consumption.

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[4] Petitioner presents only an express preemption argument and waives any implied preemption argument (Pet. Br. at 20 n.10), but the United States amicus brief argues that even if the sale ban in Section 599(f)(b) is not expressly preempted, it would be preempted under conflict preemption principles. Brief of the United States as Amicus Curiae Supporting Petitioner (Br. of the United States) at 21 n.5.

Section 599f specifies that certain types of animals, nonambulatory ones, must not be included in the food supply. The FMIA does not require that nonambulatory animals must become part of the meat inspection process. Congress has not mandated that certain types of animals must be slaughtered for human consumption. To the contrary, Congress has simply provided procedures that must be followed when an animal is slaughtered for human consumption. California's prohibition on processing nonambulatory swine for human consumption does not conflict with Congress' regulation of how animals destined for human consumption must be processed.

Construing "operations" to only encompass those activities related to the processing of meat that has not been prohibited for human consumption is consistent with the Congressional purpose behind the FMIA to regulate the quality and wholesomeness of meat.

Finally, the humane treatment provision of Section 599f(c) can be read consistently with the FMIA. In some cases e.g., some animals marked as "U.S. Condemned," federal law also requires that the animal must be humanely euthanized. In other cases, with respect to animals marked as "U.S. Suspect," the California law may be read consistently with the federal law to provide certain provisions of shelter and food while the animal awaits humane euthanization. Accordingly, the state law requirements should not be

read to be "in addition to" or "different than" those made under the FMIA itself.

ARGUMENT

THE FMIA DOES NOT EXPRESSLY PREEMPT SECTION 599f

Petitioner has seemingly abandoned the argument that Section 599f frustrates or conflicts with the FMIA and is therefore *impliedly* preempted. Pet. Br. at 20 n.10. Petitioner now argues only that Section 599f is *expressly* preempted by the terms of 21 U.S.C. § 678. Specifically, petitioner argues that any "'requirements' in Section 599f 'with respect to' slaughterhouse 'operations' that are 'within the scope of [the FMIA]' but that are 'in addition to, or different than' FMIA requirements" are preempted by the FMIA. Pet. Br. at 29.

Even when, as here, Congress has expressed its intent to preempt state law, the question of the scope of that preemption remains. Specifically, the question here is whether the challenged prohibitions of Section 599f[5] impose requirements on the "operations" of

[5] Petitioner limits its argument to federal slaughterhouses and what transpires within the federal slaughterhouse. Essentially, petitioner challenges only the prohibitions against slaughterhouses in Section 599f(a), (b), and (c). The United States and petitioner seem to concede that Section 599f does not preempt state regulation of what a slaughterhouse purchases if it takes

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slaughterhouses that are subject to federal regulation under the FMIA.[6] *Cf. Altria Group v. Good*, 555 U.S. 70 (2008) (state cause of action for fraudulent advertising of cigarettes was not a lawsuit "based on smoking or health" within the meaning of express preemption provision). If they do not, then the state regulation is "saved" from preemption by operation of language within 21 U.S.C. § 678 itself.

There is, of course, a strong presumption against federal preemption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).[7]

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place off the premises of the slaughterhouse. Pet. Br. 46 n.18; U.S. Br. 23 n.7.

[6] Petitioners concede that the "marking, labeling, packaging and ingredient requirements" are not at issue here. Pet. Br. at 29.

[7] Professor Tribe observes that the presumption against preemption "further[s] the spirit of *Garcia* [*v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)] by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end. . . . [T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which Garcia relied to protect states' interests." Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-28, at 1175-76 (3d ed. 2000), quoted in part in *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

This is particularly true where the state law concerns traditional areas that come within the police power, such as health and safety laws. *Wyeth v. Levine*, 555 U.S. 555, 129 S.Ct. 1187, 1194-1195 (2009) ("In all pre-emption cases and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (citations omitted); *see also Altria Group, Inc. v. Good*, 555 U.S. 70, 77, 129 S. Ct. 538, 543-544 (2008); *Maryland v. Louisiana*, 451 U.S. at 746; *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) (preemption analysis "starts with the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that [is] the clear and manifest purpose of Congress.") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Only if Congress intended to preempt state law will compliance with state law be excused. *See Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963) ("The purpose of Congress is the ultimate touchstone.").

"[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc.*, 555 U.S. at 77 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (rejecting the contention that the

presumption "should apply only to the question whether Congress intended any preemption at all," and not to "the scope of its intended invalidation of state law").

Section 599f is a disqualification of animals that may not, under any circumstances, be slaughtered in California *for purposes of human food production*. In its effect, the statute's preclusive disqualification of "downer" animals is analogous to a State's disqualification of the use of dogs, cats, pets or horses for human consumption. *See, e.g., Cavel Int'l, Inc. v. Madigan,* 500 F.3d 551 (7th Cir. 2007) (state ban on horse slaughter not preempted); *Empacadora de Carnes de Fresnillo v. Curry,* 476 F.3d 326 (5th Cir. 2007) (same); *see also supra* note 10. In neither case do the disqualified animals become part of the slaughterhouse "operations" that result in the production of human food.[8]

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[8] Thus, this Court's decision in *Jones v. Rath Packing Co.*, 430 U.S. 519, though involving FMIA preemption of state law, is not dispositive here. In *Rath Packing,* the Court's task – consistent with the presumption against preemption – was "'to determine whether under the circumstances of this particular case, (the State's) law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 526 (citations omitted). The Court found that California's methodology for measuring bacon weight was inconsistent with federal methodology and, accordingly, the state law was deemed to be preempted by the express language of the FMIA. Here, as will become evident, Section 599f is *complementary* to, and in no way, poses an obstacle to accomplishment of congressional purposes.

Section 678 includes a savings clause: "This chapter shall not preclude any State . . . from making requirement [sic] or taking other action, consistent with this chapter, with respect to any other matters regulated under this Act." 21 U.S.C. § 678. Slaughterhouse "operations" – in the broadest possible sense of that word – may implicate many areas of legitimate state concern, such as animal cruelty or occupational safety. Petitioner's claim of express preemption would read the FMIA as preempting state regulation from any of those areas – whether or not preemption furthers the purposes of, or obstructs accomplishment of the FMIA goal of ensuring that only quality meat enters the human food supply.[9]

The term "operations" must be read in light of Congress' manifest intent to preserve state regulation of "other matters" so long as that regulation is "consistent with" the FMIA. State disqualification of ill

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[9] Petitioner's reliance on *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) is, accordingly, unavailing. The cited reference concerns the unremarkable canon of construction that the specific will govern over the general. The question in this case is not whether Congress intended to preempt state regulation of slaughterhouse "operations," but rather the *scope* of the phrase "operations." California here contends that "operations" means only the operations that are reasonably of federal concern, and that Congress did not intend to oust States from the prerogative of disqualifying *kinds* of animals – in this case ill and suffering animals – from ever entering into "operations" of federal concern.

and suffering animals (or, indeed, horses or pets)[10] from entering the human food supply – even when the disqualification of those animals is implemented within the four walls of a slaughterhouse – gives the saving clause its full effect, while still preserving federal regulation of "operations" that implicate federal interests.

Petitioner argues that a broad interpretation must be given to both the express preemption provision in FMIA, and the definition of "operations" because "Congress was declaring it wanted uniform and comprehensive federal regulation of slaughterhouse operations." Pet. Br. at 38-39, 43-44; Veterinarian's Br. at 7. But the Congressional intent that there be comprehensive regulation of slaughterhouse operations does not support petitioner's argument that "operations" include every action on the slaughterhouse floor. Even, petitioner concedes that laws regarding building codes, workplace safety and general criminal laws are outside the scope of the FMIA, Pet. Br. at 58 n.20, although these laws

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[10] California prohibits the killing of dogs or cats with the intent to sell or give away the pelt of such animal (or to sell, buy, give away, or accept any pelt of a dog or cat). Cal. Penal Code § 598a. California prohibits the use of an animal commonly kept as a pet or companion, or any horse, burro, pony, or mule from being used as human food. Cal. Penal Code § 598b (pet prohibition with exceptions noted for livestock, poultry, fish, or other agricultural commodities), § 598c (prohibiting horse slaughter for human consumption), § 598d (prohibiting the sale of horsemeat for human consumption).

incidentally involve "operations." Similarly, animal cruelty laws and a state law disqualifying "types" of animals from the human food supply may reasonably be considered outside the scope of the FMIA despite their incidental relation to plant "operations."

Petitioner misapprehends congressional purpose behind the FMIA. Congress was not intent on ensuring that *any* particular type of meat will actually enter the human food supply, only that meat which does enter the human food supply is safe for human consumption. The purpose of the FMIA was to "assure[ ] that meat and meat food products distributed to [consumers] are wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 602; *see also* Senate Committee on Agriculture and Forestry, Wholesome Meat Act of 1967, S. Rep. No. 90-799, at 3, 19-21 (1967) as reprinted in 1967 U.S.C.C.A.N. (recommending an amendment that would limit the traffic in unfit meat and meat products); 21 U.S.C. § 603 (the purpose of the FMIA is to prevent the "use in commerce of meat and meat food products which are adulterated"). Accomplishment of Congress' purpose, therefore, means that "operations" within the contemplation of the FMIA encompasses any slaughterhouse processing of animals that may reasonably become part of the human food supply. Accordingly, animals that are *categorically disqualified* by state law from ever becoming part of the human food supply never enter the "operations" of a slaughterhouse for purposes of federal regulation.

Section 599f does nothing more than categorically exclude from the food production process certain suffering animals – downer animals – in furtherance of state health, safety, and animal welfare interests. When state law is complied with, downer animals in California – like horses in other states – never become part of the slaughterhouse "operations."

A. Section 599f's Provisions Dealing With The "Receipt And Slaughter" Of Nonambulatory Swine Are Not Expressly Preempted Because Those Animals Never Enter The Food-Production Process.

Section 599f(a) prohibits a "slaughterhouse, stockyard, auction, market agency or dealer" from buying, selling, or receiving nonambulatory animals for human consumption. Cal. Penal Code § 599f(a). Additionally, the statute states that no slaughterhouse "shall process, butcher, or sell meat or products of nonambulatory animals for human consumption." Cal. Penal Code § 599f(b). The "receipt and slaughter" prohibitions of Section 599f[11] do not deal with the "operations" of the federal slaughterhouse because the provisions are concerned with animals that will in no event become meat or meat food products.

Nothing in the FMIA or related regulations expressly requires that nonambulatory animals be

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[11] The phrase was used by the Ninth Circuit. Pet. App. at 5a.

processed, slaughtered, and sold for "meat and meat food products" in the normal course of business. The FMIA's focus is on protecting the food supply. 21 U.S.C. §§ 602-603. As discussed below, Petitioner's own references to federal regulations confirm that the Section 599f prohibitions fall outside the scope of the "operations" of a federal slaughterhouse.

1. Federal regulations contemplate that non-ambulatory animals will be disposed of in some instances and will not enter the slaughtering and inspection process for production of human food. For example, federal law specifies that animals that are "dead or dying," comatose, or showing signs of specific diseases must be classified as "U.S. Condemned" and disposed of. *See* 9 C.F.R. §§ 309.3(a)-(c), 309.13 Animals so classified "shall be killed by the official establishment, if not already dead. *Such animals shall not be taken into the official establishment to be slaughtered or dressed*; nor shall they be conveyed into any department of the establishment used for edible products. . . ." 9 C.F.R. § 309.13(a) (emphasis added; exceptions noted for some diseases). Certain "U.S. Condemned" animals, therefore, like California's "nonambulatory" animals, never enter in the inspection and production "operations" of a slaughterhouse.

Granted, not all nonambulatory animals are necessarily classified as "U.S. Condemned"; some may be classified as "U.S. Suspect." *See* 9 C.F.R. §§ 309.2(b) ("all seriously crippled animals and non-ambulatory animals shall be identified as "U.S. Suspects" and disposed of as provided in § 311.1 of

this subchapter").[12] No federal regulation requires that nonambulatory animals will be processed for human food. Thus, California's categorical exclusion of nonambulatory animals poses no impediment to effectuation of congressional purpose, because federal law does not require that "U.S. Condemned" or "U.S. Suspect" animals be included in the human food production process.

Inasmuch as they categorically disqualify non-ambulatory animals from a slaughterhouse operation altogether, the "receipt and slaughter" provisions of Section 599f are outside the preemptive language of the FMIA.[13]

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[12] The federal definition for nonambulatory livestock is nearly identical to the state definition. *See* 9 C.F.R. 309.2(b) ("Non-ambulatory disabled livestock are livestock that cannot rise from a recumbent position or that cannot walk, including, but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column or metabolic conditions."); *compare with* Cal. Penal Code § 599f(i) ("'nonambulatory' means unable to stand and walk without assistance"). The federal definition supplies examples, but does not specify how an inspector is able to discern a nonambulatory livestock from one merely "resting" – presumably because no explanation is needed. The argument from petitioner that nonambulation is a "symptom," and difficult to discern for trained federal inspectors because it may change at any moment (Pet. Br. at 58-60), is a criticism that applies equally to the FMIA. Nonambulation is a characteristic that is evident and, like color or breed, readily identifiable at the time of euthanization.

[13] Federal law requires that "amendable species" found with "symptoms of disease shall be set apart and slaughtered

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2. Arguments that Section 599f is preempted because of a federal need to conduct ante-mortem inspections are unavailing. *See* Pet. Br. at 30-31; Br. of the United States at 33; Veterinarians' Br. at 4-11. As a threshold matter, there is no evidence in the record that the provisions of the FMIA dealing with ante-mortem inspections would be affected by the plain language of Section 599f.[14] There is only argument.

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separately from all other cattle, sheep, swine, goats . . . and when so slaughtered the carcasses of said cattle, sheep, swine, goats . . . shall be subject to careful examination and inspection." 21 U.S.C. § 603(a). To the extent that such animals would be "nonambulatory" within the meaning of Section 599f, they would be excluded from the slaughterhouse operations. However, once the nonambulatory animal has been slaughtered, nothing in the California law prohibits the carcass of that animal from being inspected or examined by the proper authorities as required by the FMIA and the applicable federal regulations. Indeed, nothing in Section 599f even addresses, much less limits, post-mortem inspection of animals.

[14] The Ninth Circuit correctly found that petitioner's argument "that section 599f will prevent the examination of downer animals for disease, hindering federal procedures designed to identify and stem the spread of disease" was not supported by the record. Pet. App. at 15a n.7. Indeed, California could hardly object to federal inspections intended to prevent the spread of communicable diseases to other herd animals. California has well-developed statutory provisions dealing with preventing the spread of such diseases, protecting consumers and producers. *See, e.g.*, Cal. Food & Agric. Code §§ 10781-10786 (West 2001) (statutes authorizing the adoption of regulations to control or eradicate hog cholera, swine brucellosis, pseudorabies, and other swine diseases); *see also generally* Cal. Food & Agric. Code §§ 9801-10610 (West 2001) (similar provisions for cattle

(Continued on following page)

Petitioner argues that the initial inspection is to determine if an animal should be "set apart" and "slaughtered separately" so that their carcasses can be "subject to a careful examination and inspection." Pet. Br. at 31. Manifestly, Section 599f would accomplish the purpose of this initial inspection. As noted earlier, Section 599f says nothing about post-mortem inspections. Any federal inspections or examinations of the euthanized pig could still take place. The purpose of both federal and state regulation is to ensure that suspect meat not be admitted into the human food production process.[15]

Petitioner argues that only federal inspectors may make a decision whether an animal's carcass should be included as "meat," and whether or not the meat is "adulterated." Pet. Br. at 31-32. However, nothing in federal law mandates that an "unadulterated" carcass be admitted into human food production; the "adulteration" inspection merely removes a *federal* obstacle to including the carcass as human

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diseases); Cal. Food & Agric. Code §§ 9101-9501 (West 2001) (statutes regarding diseased animals and poultry and quarantine procedures for both).

[15] Indeed, California's categorical exclusion of non-ambulatory animals from food-production operations is consistent with federal recognition that some animals will not be processed for human consumption precisely because they were not available for ante-mortem inspection. *See* FSIS Directive 6100.1, Rev. 1 at V, 2 (recognizing that some animals will not be presented for ante-mortem inspection, and thus the federal inspectors may not permit the carcasses to be marked as "inspected and passed" and are not fit for human food).

food. No conflicting "adulteration or misbranding" determination is made by California. *See* Pet. Br. 32-34. Rather California is *categorically disqualifying* nonambulatory animals from human food production altogether.

Contrary to the views of the United States, *see* Br. of the United States at 21-23, precisely because Section 599f ensures that downer animals will not enter the human food supply in contravention of federal inspection and regulatory controls, the statute does not intrude upon the scope of federal authority. It cannot reasonably be argued that excluded nonambulatory animals must be considered to be within a slaughterhouse's "operations" in order that *federal* law, rather than *state* law, provide the basis for ensuring that a carcass does not become human food.

3. Furthermore, consistent with the rubric that Congress will not be presumed to intend a displacement of state law, *Maryland v. Louisiana*, 451 U.S. at 746, the term "operations" should not be construed so broadly as effectively to write the "savings clause" out of 21 U.S.C. § 678. Construing "operations" to eclipse state involvement with any and every activity having to do with an animal at the federal slaughterhouse, as petitioner argues here, would needlessly nullify valid state concern for the welfare and humane treatment of animals proposed for slaughtering in human food production. As noted earlier, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept

the reading that disfavors pre-emption.'" *Altria Group, Inc.*, 555 U.S. at 77 (citation omitted).

Similarly, construing the term "operations" to encompass only those activities related to the processing of meat *that has not been disqualified* for human consumption by state law does no violence to congressional desire for uniformity in regulation of meat production for human consumption. As has already been noted, Congress was not so much intent in the FMIA to determine the *kinds* of animals that may end up on America's food tables, as Congress was intent to regulate the *quality* and *marketing* of that animal food. 21 U.S.C. §§ 602, 603.

B. The Humane Treatment Provision Of Section 599f Is Not A Requirement Of The "Operations" Of A Slaughterhouse Preempted By The FMIA, And Is Consistent With That Act.

Animal welfare and the humane treatment of animals is an area of traditional state regulation. *See generally United States v. Stevens*, ___ U.S. ___, 130 S.Ct. 1577, 1583 (2010) (recognizing that all fifty states and the District of Columbia have animal cruelty laws); *see also* Brief for the United States at 24-28, *United States v. Stevens*, ___ U.S. ___, 130 S.Ct. 1577 (recognizing that animal cruelty laws first appeared during the colonial period and that every state had a law prohibiting animal cruelty by 1913). Section 599f requires that a slaughterhouse shall not

"hold a nonambulatory animal without taking immediate action to humanely euthanize the animal." Cal. Penal Code § 599f(c). The word "immediate" is not defined, but implementation of the statute need not necessarily be inconsistent with similar requirements of federal law.[16]

At a minimum, "taking immediate action" to euthanize pursuant to state law would obviate the need for later euthanization pursuant to federal law.[17] And, as respondent pointed out above, nothing in state law limits the ability of federal agents to conduct any necessary or required post-mortem inspections.

And the fact that state law may require euthanization of animals that would not require "immediate" euthanization under federal law, such as animals classified as "U.S. Suspect," does not make

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[16] Petitioner complains that Section 599f conflicts with 9 C.F.R. §§ 313.2(d)(1) and 313.1(c). *See* Pet. Br. at 47. Those provisions require that "animals unable to move shall be separated from normal ambulatory animals and placed in [a] covered pen" and the pen should be "sufficient, in the opinion of the inspector, to protect them from the adverse climatic conditions of the locale while awaiting disposition by the inspector." In light of California's concern for humane treatment of animals, it would not be reasonable to read the state statute's requirement that a slaughterhouse "tak[e] immediate action to humanely euthanize the animal" as precluding provision of shelter while the animal awaits such humane euthanization.

[17] Petitioner concedes, for example, that an animal classified as "U.S. Condemned" must be humanely euthanized. *See* 9 C.F.R. § 309.13(a).

California law inconsistent with the FMIA. The FMIA does not mandate that "U.S. Suspect" animals – or, indeed, any animals – be placed into the human food production process. Thus, the humane treatment provision of Section 599f(c) may reasonably be read as regulating the treatment of animals that, by virtue of state disqualification, are outside the purview of the FMIA.

The implicit claim by petitioner that there is risk to animal and human health and safety caused by section 599f's provisions regarding immediate euthanization is conclusory and is not supported by the record in this case.[18] Pet. Br. at 12-14, 17-18, 63. In any event, preventing the risks of the spread of widespread animal disease is not the purpose of the FMIA and this is illustrated by the fact that the federal government adopted a similar regulation with respect to the immediate humane euthanization of non-ambulatory cattle and a prohibition against including the carcasses of those animals in the food supply. 9 C.F.R. § 309.3(c); *see also* 74 Fed. Reg. 11463, 11463 (March 18, 2009).[19] Presumably, this similar directive

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[18] *See supra* note 14.

[19] The FSIS noted that this rule was changed to reduce uncertainty in determining the proper disposition of non-ambulatory disabled cattle and would eliminate the time FSIS public health veterinarians spend determining whether or not an animal can be tagged as "U.S. Suspect," proceed to slaughter, and then be re-inspected after slaughter, thereby increasing the time inspection personnel can focus on other inspection activities. 74 Fed. Reg. at 11463.

from the federal government does not pose a significant risk to animal or human health either.

A reasonable reading of preemption language in 21 U.S.C. § 678 consistently with that statute's savings clause should not oust California of its insistence that animals – which are, in any event, disqualified from entry into the human food production process – be humanely treated and euthanized.[20]

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[20] In any event, these proceedings arise in the context of a motion for preliminary injunction. And, in connection with subdivision (e) of Section 599f, the Ninth Circuit concluded that petitioner failed to offer any evidence of irreparable injury or that the balance of equities and public interest did not favor enforcement of state law. *See* Pet. App. 17a.

CONCLUSION

The Ninth Circuit's decision should be affirmed.

Dated: October 3, 2011

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RESPONDENT'S BRIEF

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No. 10-224

In the Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,
Petitioner,

v.

KAMALA D. HARRIS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held that the National Meat Association ("NMA") was not entitled to a preliminary injunction on its claim that the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. §§601 *et seq.*, expressly preempts certain provisions of California Penal Code Section 599f ("§599f"), a statute that prevents the transport, sale, slaughter, and abuse of animals too injured or sick to stand and walk on their own.

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INTRODUCTION

Each year thousands of pigs are transported to slaughterhouses in such weak, crippled, or unhealthy condition that they collapse on the transport trucks or soon after unloading, and cannot stand or walk. Pushing these animals through the transport, delivery, inspection, and slaughter process in order to turn them into meat for human consumption creates a well-documented danger of cruel mistreatment and increased pain and suffering. California Penal Code §599f represents a reasonable judgment by the people of California that they do not want anyone transporting or buying these animals, and do not want slaughterhouses to receive them or process them into human food. California's law stands in a long tradition of state regulation of livestock husbandry and prevention of cruelty to agricultural animals.

The Federal Meat Inspection Act ("FMIA"), 21 U.S.C. §§601 *et seq.*, preempts state law requirements "within the scope of this Act with respect to premises, facilities, and operations" of federally-inspected slaughterhouses. 21 U.S.C. §678. As petitioner and the United States concede, the FMIA *does not* preempt every state law that affects slaughterhouses, or even every state law that regulates what slaughterhouse workers do on or near the premises of a slaughterhouse. The "operations" of a slaughterhouse are the "practical work" of turning animals into meat, *see* NMABr.33 & n.12, *i.e.*, "'the slaughter of animals and the preparation of the carcasses, parts thereof, meat and meat food products,'" U.S.Br.24 (quoting 21 U.S.C. §623(a)). The "scope" of the FMIA covers—and is limited to—a system of inspections that must occur, and rules that must be followed, before meat can be

sold in interstate commerce for human consumption. Importantly, however, nothing in the FMIA or the regulations *requires* a slaughterhouse to present any particular animal for inspection and slaughter.

Through §599f, California does not regulate the "practical work" of turning animals into meat, and it does not attempt to alter in any way the federal inspections that must occur before meat can be sold in interstate commerce. It removes a class of animals from the human food production chain entirely, for moral and humane reasons. Every court that has considered the issue has held, correctly, that state laws of that nature are not preempted. There is no requirement that such laws must withdraw entire species (like horses, dogs, or cats) from slaughter or turn on "immutable" characteristics in order to escape preemption. Laws withdrawing a class of animal from the slaughter process entirely, to advance legitimate regulatory objectives unrelated to the safety of the meat supply, do not regulate slaughterhouse "operations" and are outside the FMIA's "scope." Any doubt should be resolved by the presumption "'that the historic police powers of the States were not to be superseded by the Federal Act unless that were the clear and manifest purpose of Congress.'" *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted).

The district court issued a broad preliminary injunction barring the application of §599f to swine slaughterhouses inspected under the FMIA. That injunction is, at a minimum, overbroad. Section 599f's prohibitions on "delivering" and "receiv[ing]" nonambulatory pigs have nothing to do with slaughterhouse operations. They make ineligible for

slaughter a specific, clearly defined and identifiable category of animals that have become nonambulatory before arrival, because of the increased chance that these animals will suffer if forced through the process—regulatory issues that are plainly within California's power, and outside the FMIA's scope. At least as applied to animals that arrive already unable to walk or stand, §599f(b)'s prohibition on purchasing nonambulatory animals and §599f(c)'s humane euthanasia requirement just operate as reasonable adjuncts to the receipt and delivery provisions. And §599f(b)'s ban on the sale of meat products for human consumption that are produced from nonambulatory animals also is not a regulation of slaughterhouse operations; it regulates the "commercial sales activities of slaughterhouses," an area that the United States *concedes* states may regulate. U.S.Br.17. As applied to animals that become nonambulatory after ante-mortem inspection, §§599f(b) and (c) present a closer case. But those provisions, too, are best understood as humane measures that do not regulate slaughterhouse "operations" and are outside the FMIA's scope.

STATEMENT OF THE CASE

I. REASONS FARM ANIMALS BECOME NONAMBULATORY AND THE CONSEQUENCES

The general absence of federal or state humane regulations on farms, and the economic dynamics of industrial-scale agriculture, have produced a persistent problem with livestock, including pigs, that arrive at slaughterhouses so injured or ill that they cannot stand or walk, or soon become unable to stand or walk. Once these animals go down, continuing to move them through the production process causes great suffering.

The abuse of nonambulatory livestock has garnered significant attention in recent years. In January 2008, the Humane Society of the United States ("HSUS") released the results of an investigation into the Hallmark Meat Packing Company and Westland Meat Company, Inc., located in Chino, California ("Hallmark/Westland").[1] The investigation revealed cruel practices being used to force dairy cows to slaughter who were too sick and injured to stand and walk, including "ramming cows with the blades of a forklift . . . [and] dragging them with chains pulled by heavy machinery."[2] Another investigation into practices at the Bushway Packing plant in Grand Isle, Vermont, documented veal calves too sick, weak or injured to stand enduring horrific abuse.[3] Nonambulatory calves were repeatedly kicked and shocked in their necks, faces, and torsos in an effort to force them to move off arriving trucks, to holding pens, or to the slaughter line. *Id.* One calf was videotaped being electrically shocked more than thirty times, and also kicked, slapped, and lifted and dropped. *Id.*

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[1] *See* HSUS, *Rampant Animal Cruelty at California Slaughter Plant: Undercover investigation finds abuse at major beef supplier to America's school lunch program* (Jan. 30, 2008), http://www.humanesociety.org/news/news/2008/01/undercover_investigation_013008.html.

[2] Mot. to Intervene, No. 08-1963, Dkt. 46 (E.D. Cal.) at Ex. 3, Declaration of Nancy Perry ("Perry Decl.") ¶22 & Attach. E (Testimony of W. Pacelle) at 1.

[3] *See* HSUS, *Abused Calves at Vermont Slaughter Plant; Shocking Cruelty caught on video* (Oct. 30, 2009), http://www.humanesociety.org/news/news/2009/10/calf_investigation_103009.html.

The problem of nonambulatory pigs, in particular, is widely recognized in the slaughter industry. These pigs face great risks of suffering and abuse, because "[m]aintaining an adequate level of animal welfare at the plant level is impossible if the pigs are too weak to walk through the yards."[4]

Most pigs who go down do so for reasons that begin long before the animals arrive at the slaughter facility. As one industry article explained, "[t]he packer is at the mercy of the pigs' experiences prior to arriving at the plant."[5] The so-called "fatigued pig syndrome" is a convenient label invented by the industry to justify the number of animals who become nonambulatory for reasons the industry cannot or does not want to explain—likely due to factors of mass production, grueling long-distance transport, and injury that the industry has freely chosen to make an integral part of the business of turning pigs into meat.[6] The best scientific article on the subject concluded in 2008 that nonambulatory pigs suffer from a laundry list of physical and systemic problems, including bone injury; painful foot and leg problems; respiratory, kidney and

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[4] Temple Grandin, *Fixing the downer pig problem*, Meat & Poultry, May 2006, at 82.

[5] John McGlone, *Fatigued Pigs: The Final Link*, Pork Magazine. Mar. 2006, at 14.

[6] Petitioner's *amici* American Association of Swine Veterinarians et al. ("AASV") assert, without support, that the sick, lame, injured and suffering pigs who §599f takes out of the system are simply healthy and tired. AASVBr.14, 18, 19. No scientific or valid industry research is cited for these statements.

liver disease and dysfunction; and infection.[7] The causes of these phenomena include:

Genetic Issues.

The average market weight of a domestic pig has been rising steadily for decades, and is now close to 300 lbs.[8] Pigs are being bred for size and maximum lean muscle mass, without regard for whether the animal's legs and feet can support that mass—or for what other genetic defects are being introduced.[9] For example, "[s]ome genetic lines of lean hybrid pigs have terrible leg conformation" so that their ankles that are entirely collapsed and they are forced to walk on their dewclaws rather than their hooves.[10] Some lines also suffer from "Porcine Stress Syndrome," a genetic disorder that causes pigs to overheat and collapse or die in response to stress. *Id.*; Greger Decl., Attach. K (Animal Welfare Issues Compendium) at 6.

Factory farming methods.

Current industrial farming practices often result in weakened livestock and increase the risk that they will become nonambulatory. Overcrowding of pigs in

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[7] Mahairi A. Sutherland et al., *Health of non-ambulatory, non-injured pigs at processing*, 116 Livestock Sci. 237, 240-44 (2008); *see also* S. Alexandersen et al., *The Pathogenesis and Diagnosis of Foot-and-Mouth Disease*, 129 J. Comp. Pathology 1-36 (2003).

[8] John McGlone & Wilson G. Pond, *Pig Production: Biological Principles and Applications* 225-26 (2003).

[9] *See, e.g.*, Mot. to Intervene No. 08-1963, Dkt. 47 (E.D. Cal.), at Ex. 4, Declaration of Michael Greger ("Greger Decl.") ¶6.

[10] Temple Grandin, *Reducing Fatigue and Non-Ambulatory Pigs in Slaughter Plants to Improve Welfare, available at* http://www.grandin.com/meat/reduce.fatigued.pigs.html (last visited Sept. 27, 2011).

indoor facilities can lead to respiratory and other health problems.[11] Farm conditions also can make pigs more difficult to handle at the slaughterhouse. "Pigs finished on metal mesh floors are extremely difficult to drive at the packing plant" because "[t]hese animals grow excessively long hooves and they do not know how to walk on concrete."[12] "Overcrowding of finishing pens also contributes to handling problems." *Id.*

Certain pigs raised in intensive confinement with little or no opportunity to move around may be even more likely to become nonambulatory. Breeding sow stalls are often only about two feet wide, making it impossible for sows to turn around and difficult for them to lie on their sides.[13] Instead, they are often forced to lie with their heads in their feed troughs in positions that cause difficulty walking, grazed skin, and broken limbs.[14] The concrete or slatted floors in the

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[11] Vibeke Sørenson et al., *Diseases of the Respiratory System*, *in* B.E. Straw et al., *Diseases of Swine* 149 (9th ed. 2006); C.M. Wathes, *Aerial Pollutants from Weaner Production*, *in* The Weaner Pig: Nutrition and Management 259 (2001).

[12] Temple Grandin, *Environmental Enrichment for Confinement Pigs*, Proceedings of the 1988 Annual Meeting of the Livestock Conservation Institute, *available at* http://www.grandin.com/references/LCIhand.html (last visited Sept. 28, 2011).

[13] R. Cariolet, *Study of the postures of pregnant blocked sows during the resting period: relationship between width of crates and disorders at farrowing*, Journées de la Recherche Porcine en France 189 (1991).

[14] Compassion in World Farming Trust, *The Welfare of Europe's Sows in Close Confinement Stalls* 10-11 (Sept. 2000), *available at* http://tinyurl.com/62c6fp5 (citing Peter Egle,

stalls can cause foot injuries, inflammation of joints, and skin abrasions that, if infected, can lead to septic arthritis causing severe, chronic pain.[15] As a result of their extreme confinement in these conditions, sows' muscles atrophy and they lose bone strength.[16] "The majority of U.S. breeding sows are so restrictively confined for the great majority of their lives that when they are trucked to slaughter, they are routinely injured, and weak and thus likely to collapse in transit or at slaughter."[17] Factory farms keep sows breeding until they are too old or weak to bear additional pregnancies, and then ship them off for slaughter with no chance to recover any strength. The predictable consequence is collapse *en route* or shortly after arrival.[18]

Erfahrungen bei der Umsetzung der Schweinehaltungsverordnung, Proceedings of DVG Conference on Protection of Domestic Animals 177-83 (Mar. 1998)).

[15] John Webster, *Animal Welfare: A Cool Eye Towards Eden*, 149 (1994).

[16] J.N. Marchant & D.M. Broom, *Effects of dry sow housing conditions on muscle weight and bone strength*, 62 Animal Sci. 105, 105-06 (1996).

[17] Comments of the Humane Society of the United States, Docket FSIS-2010-0041 (Apr. 8, 2011) ("HSUS Comments"), at 35, http://www.regulations.gov/#!documentDetail;D=FSIS-2010-0041-5164; *see* Temple Grandin, *Handling of Crippled and Nonambulatory Livestock*, Animal Welfare Information Center Bulletin, Vol. 9 (Fall 1998), *available at* http://www.nal.usda.gov/awic/newsletters/v9n1/9n1grand.htm (last visited Oct. 1, 2011).

[18] The United States Department of Agriculture's recognition of a similar phenomenon among dairy cows was a factor motivating its prohibition on the slaughter of nonambulatory cattle. Requirements for the Disposition of Cattle that Become

These problems are exacerbated by widespread abuse of the drug Paylean, which increases lean muscle mass but "'makes pigs more susceptible to stress from handling and increases transport stress.'" HSUS Comments, at 34 (citation omitted). It is well understood by the industry that Paylean abuse increases the number of nonambulatory pigs. *Id.* at 34-35; Grandin, ***Reducing Fatigue***, *supra* n.10.

Inhumane transport conditions.

"Before they are slaughtered, U.S. livestock may travel an average of 1,000 miles." Greger Decl., Attach. C (*The Long Haul: Risks Associated with Livestock Transport*) at 301. The transport of animals can result in grave injury, severe stress, and death.[19] The Food and Agriculture Organization of the United Nations has concluded that the "[t]ransport of livestock is undoubtedly the most stressful and injurious stage in the chain of operations between farm and slaughterhouse and contributes significantly to poor animal welfare and loss of production."[20] Animals may

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Non-Ambulatory Disabled Following Ante-Mortem Inspection, 74 Fed. Reg. 11,463, 11,464-65 (Mar. 18, 2009). According to USDA, milk producers have an incentive to "[h]old[] dairy cattle until they become exceptionally old or weak before sending them to slaughter" in order to "extract as much milk as possible," but "[s]ending such weakened cattle to slaughter increases the chances that they will go down and then be subjected to conditions that are inhumane." *Id.* at 11,465.

[19] Temple Grandin, *Introduction: Management and Economic Factors of Handling and Transport*, *in* Livestock Handling and Transport 4-5 (Temple Grandin ed., 2000).

[20] Food and Agriculture Organization of the United Nations, *Guidelines for Humane Handling, Transport and Slaughter of Livestock* (2001), *available at* http://www.fao.org/DOCREP/003/X6909E/x6909e08.htm; *see*

be killed, injured, dehydrated, starved, and severely stressed as a result of being confined during transport in overcrowded vehicles where they are exposed to temperature extremes and routinely denied food and water. The United States Department of Agriculture ("USDA") only recently acknowledged it had authority to enforce a law, which had been on the books for decades but was widely ignored, requiring animals transported by truck for more than 28 consecutive hours to be let out and given food, water, and a chance to rest.

Thousands of pigs are loaded into trucks every day and shipped to California from as far away as Nebraska and Texas. Truck transport is especially harmful to pigs, chiefly because they cannot regulate their body temperatures well, and are therefore extremely sensitive to heat and cold. Nationwide, approximately 220,000 die, and another 440,000 become nonambulatory, annually during the transportation process.[21] Merely increasing the truck space for each pig from 0.39 square meters to 0.48 square meters appears to cut the incidence of dead or nonambulatory animals upon arrival dramatically, but such simple preventive measures are often ignored because

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generally Greger Decl., Attach. C (*The Long Haul*).

[21] The American Farm Bureau estimates that 100 million pigs are slaughtered annually in the U.S. *See* Comments of the American Farm Bureau Federation, Non-Ambulatory Disabled Veal Calves and other Non-Ambulatory Disabled Livestock at Slaughter: Petitions For Rulemaking at 4, Docket FSIS-2010-0041 (Mar. 22, 2011). http://www.regulations.gov/#!documentDetail;D=FSIS-2010-0041-4456. The National Pork Board estimates that 0.22% of pigs transported to market die and 0.44% become nonambulatory. *See* National Pork Board, *Transport Quality Assurance Handbook* 25 (2008), *available at* http://tinyurl.com/6fqa9v6.

trucking companies have limited economic incentives to deliver animals in healthy condition. Greger Decl., Attach. D (*Effect of floor space during transport of market-weight pigs*) at 2861. Stress incurred during transport may manifest after the pig has arrived at the slaughterhouse,[22] and can be exacerbated by the common practice of depriving animals of all food for 12 to 24 hours prior to slaughter.[23]

Rough Handling at the Slaughter Facility

Aggressive handling of pigs at any stage of the production process, particularly when it involves the use of an electric prod, "can result in the metabolic response associated with downer pigs." *Id.*, Attach. G (*Stressful Handling of Pigs*) at 3; *see also id.*, Attach. I (*Livestock Trucking Guide*) at 6 ("In one study, hogs which were repeatedly shocked with electric prods and handled roughly had five times as many non-ambulatory stressors compared to hogs handled carefully."). The length of time pigs are left packed into the truck at the slaughter facility before being unloaded by slaughterhouse personnel also is positively correlated with the number of nonambulatory pigs at the facility. *Id.*, Attach. D at 2862.

As a practical matter, efforts to push nonambulatory animals through the inspection-and-slaughter process unavoidably involve the infliction of pain and stress far greater than what healthy animals experience, and a strong possibility of horrific abuse.

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[22] John McGlone, *Fatigued Pigs: The Transportation Link*, Pork Magazine, Feb. 2006, at 14.

[23] Morgan Morrow et al., *The effect of feed withdrawal on pork quality and the prevalence of salmonella and gastric ulcers at slaughter* 2 (2001), *available at* http://tinyurl.com/4xk76u4.

NMA and the United States suggest that most nonambulatory pigs are just tired and will recover if given a chance to rest. NMABr.11; U.S.Br.28. That simplistic picture conceals a grim reality.

Federal regulations require that nonambulatory pigs be segregated, 9 C.F.R. §§309.2(b), (n), but they do not usually become nonambulatory in convenient locations where they can be given food or water and allowed to rest in place. And slaughterhouse personnel who want to move a 300-pound nonambulatory pig, either to slaughter or to a segregated area to "rest," have simple choices. They can induce the pig to walk by applying pain and/or brute force in some form. And they can push, drag, or otherwise maneuver her using heavy machinery. As members of Congress explained when debating proposed legislation in 2001, "[t]hese animals, known as downers, suffer beyond belief as they are kicked, dragged, and prodded with electric shocks in an effort to move them at auctions and intermediate markets en route to slaughter." 147 Cong. Rec. H6367 (daily ed. Oct. 4, 2001) (statement of Rep. Ackerman). "It is practically impossible to move these animals humanely, so they are commonly dragged with chains and pushed around with tractors and fork lifts." *Id.*; *see also id.* (statement of Rep. Morella) ("[H]umane euthanasia is the only reasonable solution. It is civilized to oppose needless animal cruelty and inexcusable to allow it to continue."); *id.* at 6368 (statement of Rep. Kelly) (describing measures necessary to move downed animals through slaughter as "abusive and torturous").[24]

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[24] These debates ultimately resulted in a 2002 amendment to the Humane Methods of Slaughter Act ("HMSA"), codified at 7

In practice, the consequences of slaughterhouse efforts to move downed pigs have have been horrifying. HSUS recently compiled Noncompliance Reports from USDA's Food Safety and Inspection Service ("FSIS") showing that slaughter facility personnel have:

- dragged nonambulatory pigs with ropes,
- dragged pigs by their ears,
- dropped pigs from bone-breaking heights,
- caused pigs to be trampled,
- run over pigs with heavy machinery; and
- dumped pigs in "suspect" pens and then denied them any access to water for great lengths of time.

HSUS Comments at 2. Inspectors have observed "conscious and whining" nonambulatory pigs "shackled by their hind legs being dragged into the stunning area" of the slaughter facility. *Id.*, Attach. 2 at 39. One observed a nonambulatory pig with a nearly-severed left hind foot hanging from the pig's leg by the skin—an injury that was apparently the result "of some type of shearing force like that produced by the bucket of the skid steer loader." *Id.* at 107. One watched a nonambulatory, conscious pig being run over by a bulldozer that was being used to move another nonambulatory pig out of the pen. *Id.* at 115. Another witnessed a slaughterhouse employee drive ambulatory pigs over downed pigs, and noted that "[n]o protection was given to the disabled hogs. No attempt was made to move the disabled hogs out of the path of

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U.S.C. §1907, which grants USDA authority to issue regulations it believes necessary "to provide for the humane treatment, handling, and disposition of nonambulatory livestock by stockyards, market agencies, and dealers." The law does not address the issue of nonambulatory animals at slaughterhouses.

the ambulatory hogs." *Id.* at 112.

II. CALIFORNIA PENAL CODE §599F

"The regulation of animals has long been recognized as part of the historic police power of the States." *DeHart v. Town of Austin*, 39 F.3d 718, 722 (7th Cir. 1994); *accord State v. Double Seven Corp.*, 219 P.2d 776, 779 (Ariz. 1950) ("The state has the right under its police power to regulate the livestock industry, particularly that portion devoted to the slaughter and sale of animals for human consumption.").

Cruelty to animals, in particular, has traditionally been regulated by the states, going back nearly 400 years to the Massachusetts Bay Colony—which proscribed "any Tirrany or Crueltie towards any bruite Creature which are usuallie kept for man's use."[25] All 50 states had codified animal protection laws by 1913. *Id.* at 13-14. Such laws reflect traditional interests in public morality, and the desire of food consumers not to subsidize conduct they find morally abhorrent. *See, e.g., Waters v. People*, 46 P. 112, 113 (Colo. 1896) ("[The anti-cruelty law's] aim is not only to protect these animals, but to conserve public morals . . . ."); *Johnson v. District of Columbia*, 30 App. D.C. 520, 522 (D.C. 1908) (preventing animal cruelty "is in the interest of peace and order and conduces to the morals and general welfare of the community"). States also traditionally have regulated the kinds of animals that can be turned into meat for human consumption, such

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[25] Emily Stewart Leavitt & Diane Halverson, *The Evolution of Anti-Cruelty Laws in the United States*, *in* Animals and Their Legal Rights: A Survey of American Laws from 1641 to 1978 at 11 (Animal Welfare Inst. 1978).

as by prohibiting the slaughter of dogs, cats, and horses.[26]

In 1993 California exercised this authority to regulate animal cruelty by enacting the California Downed Animal Protection Act, in response to a Farm Sanctuary investigation documenting evidence of inhumane handling of downed livestock at Hallmark/Westland. Perry Decl. ¶11. That law, codified as California Penal Code §599f, reflected a judgment by the people of California that efforts to slaughter downed animals necessarily involve morally unacceptable risks of egregious inhumane treatment. 1994 Cal. Legis. Serv. ch. 600 at 2961. The legislative record also reflected concern that meat products produced from nonambulatory animals may pose substantial risks to human health, particularly in the case of cattle—which may carry bovine spongiform encephalopathy, or "mad cow" disease. JA 57-62.

Nearly a decade and a half later, HSUS released a video from the second Hallmark/Westland investigation, *supra*, at 4, depicting images of sick and disabled cows being dragged by forklifts, kicked, and electro-shocked on their way to being slaughtered. Federal inspectors were present, but failed to detect or stop these "egregious humane handling violations."[27]

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[26] Cal. Penal Code §598b; Del. Code Ann. tit. 11, §1325(b)(4); Ga. Code Ann. §26-2-160; 225 Ill. Comp. Stat. §635/1.5(a); Mich. Comp. Laws §750.477a; Miss. Code Ann. §97-27-19; N.J. Stat. Ann. §4:22-25.4; N.Y. Agric. & Mkts. Law §96-d; Tex. Agric. Code Ann. §149.002; Va. Code Ann. §3.2-6570.

[27] *See* Office of Inspector General, USDA, *Audit Report: Evaluation of FSIS Management Controls Over Pre-Slaughter Activities* at iii (Nov. 28, 2008), *available at* http://www.usda.gov/oig/webdocs/24601-07-KC.pdf.

The San Bernardino County District Attorney charged a Hallmark pen manager with felony animal cruelty and misdemeanor counts of unlawfully moving a downed animal under former §599f(c).[28] Former Secretary of Agriculture Ed Schafer stated "it is regrettable that these animals were mistreated and I am encouraged and *supportive of these actions* by the San Bernardino District Attorney in response to this mistreatment."[29]

This evidence of continuing cruelty by slaughter establishments prompted the California Legislature to strengthen §599f by adopting an amendment proposed by Respondent Humane Farming Association. Section 599f as amended was signed into law on July 22, 2008 and became effective January 1, 2009.

NMA challenges only three provisions of §599f as amended. The relevant prohibitions state:

(a) No slaughterhouse, stockyard, auction, market agency, or dealer shall buy, sell, or receive a nonambulatory animal.

(b) No slaughterhouse shall process, butcher, or sell meat or products of nonambulatory animals for human consumption.

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[28] *See* HSUS, *Hallmark Slaughter Plan Manager Convicted of Felony Animal Cruelty*, http://www.humanesociety.org/news/press_releases/2008/06/hallmark_slaughter_plant_manager_felony_cruelty_conviction_062008.html (last visited Sept. 29, 2011).

[29] Press Release, USDA, Statement by Secretary of Agriculture Ed Schafer Regarding Animal Cruelty Charges Filed Against Employees at Hallmark/Westland Meat Packing Company. (Feb. 15, 2008), *available at* http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2008/02/0044.xml (emphasis added).

> (c) No slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.

Cal. Penal Code §599f. The statute defines a "nonambulatory" animal as one that is "unable to stand and walk without assistance." *See id.* §599f(i).

III. THE FEDERAL MEAT INSPECTION REGIME

There is no general federal anticruelty law that applies to farm animals.[30] Two separate federal statutes, the Federal Meat Inspection Act ("FMIA" or "Act") and the Humane Methods of Slaughter Act ("HMSA"), regulate the production of meat for human consumption at federally-inspected slaughterhouses.

A. Federal Meat Inspection Act

In response to widespread public outrage following the release of Upton Sinclair's *The Jungle*, Congress inserted into the 1906 and 1907 agriculture appropriations bills an amendment "for the purpose of preventing the use in interstate or foreign commerce, as hereinafter provided, of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food." Pub. L. No. 59-382, 34 Stat. 669, 674 (1906); Pub. L. No. 59-242, 34 Stat. 1256, 1260 (1907). The amendment gave the Secretary of Agriculture ("Secretary") discretion to establish a process for ante-mortem and postmortem inspection of "all cattle, sheep, swine, and goats"

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[30] The Animal Welfare Act, 7 U.S.C. §§2131-59, exempts most farm animals from the definition of "animal," *see* 7 U.S.C. §2132(g).

slaughtered to provide meat sold in interstate and foreign commerce.

As petitioner and the United States repeatedly concede, the purpose of that inspection process was "'to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products in interstate and foreign commerce.'" NMABr.3 (quoting *Pittsburgh Melting Co. v. Totten*, 248 U.S. 1, 4-5 (1918)). Members of both houses emphasized the need to alleviate the public's concerns about the possibility of consuming contaminated meat. *See, e.g.*, 40 Cong. Rec. 9017 (1906) (statement of Sen. Bailey) ("I am deeply anxious to see this Congress enact a law that will restore confidence at home and abroad in the cleanliness of our methods and in the wholesomeness of our meats."). The legislative record contains no discussion of ethical concerns regarding what kinds of animals should be slaughtered, or the treatment of animals within slaughterhouses.

In 1967, Congress recodified the 1907 provision into the FMIA, 21 U.S.C. §§601 *et seq.* Again, petitioners concede that "[l]ike its predecessor, the new legislation had 'one basic and fundamental objective—to insure the wholesomeness and cleanliness of the entire meat supply in th[e] United States.'" NMABr.3-4 (quoting 113 Cong. Rec. 30512 (1967) (statement of Rep. May)); *see also id.* at 43 ("Congress determined that only federal standards could adequately protect meat and meat food products[.]"). Congress declared that "[i]t is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged." FMIA §2, Pub. L. No. 90-201,

81 Stat. 584, 587 (1967) (codified at 21 U.S.C. §602). Every court that has considered the FMIA's purposes has agreed that it "was designed to insure that meat products sold to the consumer be clean and safe." *United States v. Seuss*, 474 F.2d 385, 388 (1st Cir. 1973).[31] Again, nothing in the legislative history indicates any concern with animal welfare, with what animals should or should not become meat, or with maximizing the supply of meat.

The 1967 recodification also included the express preemption provision at the heart of this case. It provides in relevant part that:

> [r]equirements within the scope of this Act with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this Act, which are in addition to, or different than those made under this Act may not be imposed by any State
> . . . .

Pub. L. No. 90-201, 81 Stat. 600 (codified at 21 U.S.C. §678).[32] Congress also included a savings clause providing that "[t]his Act shall not preclude any State

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[31] *See also, e.g., Cavel Int'l Inc. v. Madigan*, 500 F.3d 551, 545 (7th Cir. 2007), *cert. denied*, 554 U.S. 902 (2008) ("The Act is concerned with inspecting premises at which meat is produced for human consumption . . . ."); *United States v. Espy*, 145 F.3d 1369, 1371 (D.C. Cir. 1998) (The Act "seeks to ensure safe meat products."); *see also Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1280-81 (Fed. Cir. 2009) (noting that since "Congress enacted the Meat Inspection Act . . . the public has come to expect that federal agencies will police the safety of the food products in interstate commerce"), *cert. denied*, 130 S. Ct. 1501 (2010).

[32] The original Public Law uses "Act," but the bound version of the U.S. Code and some online reference sources use "chapter."

or Territory or the District of Columbia from making requirement [sic] or taking other action, consistent with this Act, with respect to any other matters regulated under this Act." *Id.* (footnote omitted).

Very few decisions have interpreted the relevant language of §678. In the two leading cases, the Fifth and Seventh Circuits held that state laws prohibiting the slaughter of horses for human consumption were not preempted. The Fifth Circuit held that the preemption clause is "naturally read as being concerned with the methods, standards of quality, and packaging that slaughterhouses use" rather than limiting "states in their ability to regulate what types of meat may be sold for human consumption in the first place." *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 333 (5th Cir.), *cert. denied*, 550 U.S. 957 (2007). The Seventh Circuit similarly held that the "[FMIA] is concerned with inspecting premises at which meat is produced for human consumption, *see, e.g.*, 21 U.S.C. §606, rather than with preserving the production of particular types of meat for people to eat." *Cavel*, 500 F.3d at 554. The court reasoned that, while any horse meat that is produced must comply with the FMIA, if horse meat is not produced "there is nothing, so far as horse meat is concerned, for the [FMIA] to work upon." *Id.*

B. Humane Methods of Slaughter Act

In 1958, Congress enacted the Humane Methods of Slaughter Act, Pub. L. No. 85-765, 72 Stat. 862 (1958) (codified as amended at 7 U.S.C. §§1901-07), "to establish as a national policy that livestock should be slaughtered and handled in connection with slaughter only by the 'most humane practicable methods.'" H.R. Rep. No. 85-706, at 133 (1957). Congress tackled the

issue of humane slaughter at the behest of humane associations, and the proposed law garnered overwhelming support and the largest volume of mail the committee had ever received on a single matter. *See* H.R. Rep. No. 85-706, at 131; S. Rep. No. 85-1724, at 3933 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3932, 3932-42. Dozens of witnesses encouraged Congress to ensure that animals who enter the food supply are humanely slaughtered. *See, e.g., Humane Slaughtering of Livestock: Hearing Before the Comm. on Agriculture and Forestry on S.1213, S.1497, and H.8308*, 85th Cong. 59-60, 81, 102, 112 (1958) ("*Hearing on S.1213*") (emphasizing, in particular, that animals must be rendered insensible to pain prior to slaughter).

The HMSA contains no preemption provision, and nothing in the legislative record indicates that Congress intended for the law to become the exclusive source of regulations governing the humane treatment of livestock. In fact, the Committee on Agriculture acknowledged that "virtually all of the States have laws against the inhumane treatment of animals, many of which apparently do apply to slaughterhouse operations," and further "recognized the difficulties and the problem of constitutionality involved in a criminal statute asserting Federal jurisdiction in an area where the States not only have authority to act but where they have exercised that authority." H.R. Rep. No. 85-706, at 131. Based in part on this concern, the final Act did not impose criminal penalties, but instead simply directed the U.S. Government to refuse to buy meat from any processor that used inhumane methods to slaughter animals. *See* former 7 U.S.C. §1903 (repealed 1978).

In 1978, Congress repealed that purchasing restriction and amended the FMIA to provide criminal penalties, and to allow the Secretary to suspend facility inspection, if a slaughterhouse employs methods of slaughter or handling in connection with slaughter "not in accordance with the Act of August 27, 1958"—*i.e.*, the original HMSA. 21 U.S.C. §§603(b), 610(b), 676. Congress's purpose was "[t]o amend the Federal Meat Inspection Act to require that meat inspected and approved under such Act be produced only from livestock slaughtered in accordance with humane methods . . . ." Pub. L. No. 95-445, 92 Stat. 1069, 1069 (1978). A contemporaneous Senate report recognized that the original "impetus for the enactment of the Humane Slaughter Act was a growing national concern for the humane treatment of animals," and indicated that an amendment to strengthen the HMSA was justified by "reports of continued cruelty to and abuse of livestock at the few plants that are not already using humane methods." S. Rep. No. 95-1059, at 2-3 (1978). Nothing in the legislative history suggests any belief by Congress that the amendment would displace traditional state animal cruelty law or state regulation of the kinds of animals that can be slaughtered or sold for human consumption.

C. Relevant Federal Regulations

The first step in the FMIA regulatory process is triggered when a slaughterhouse decides to present an animal for "ante-mortem inspection" under 21 U.S.C. §603. If a slaughterhouse chooses to present an animal for inspection, federal inspectors may either (1) pass the animal for slaughter, (2) identify the animal as "suspect," or (3) condemn the animal and remove it

from the slaughter process.[33] Animals identified as "suspect," including nonambulatory disabled animals, are segregated and removed from the slaughter process unless and until they are readmitted after re-inspection by a federal official. 9 C.F.R. §309.2(b), (g), (i)-(k).

Notably, however, nothing in the FMIA or the regulations *requires* a slaughterhouse to present any particular animal for inspection and slaughter. The slaughterhouse always has the option not to "offer[] for slaughter" any particular animal, 9 C.F.R. §309.1, on humane or any other grounds. The regulations provide that animals that collapse *after* ante-mortem inspection may be released "for a purpose other than slaughter" if the establishment "obtain[s] permission for the removal of such animal from the local, State, or Federal livestock sanitary official having jurisdiction." 9 C.F.R. §309.2(p), *see also* §309.13(d). FSIS's own "Slaughter Inspection 101" "Fact Sheet" explains that:

> If an animal goes down or shows signs of illness after receiving and passing ante mortem inspection before slaughter, the establishment must immediately notify the FSIS veterinarian to make a case-by-case disposition of the animal's condition. *Alternatively, the establishment may humanely euthanize the animal.*

FSIS, USDA, *Fact Sheet: Slaughter 101*, http://www.fsis.usda.gov/Fact_Sheets/Slaughter_Inspection_101 (last visited Sept. 29, 2011) (emphasis

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[33] 9 C.F.R. §§301.2, 309.2; FSIS, USDA, *FSIS Directive 6100.1* at 5 (Apr. 16, 2009), *available at* www.fsis.usda.gov/OPPDE/rdad/FSISDirectives/6100.1Rev1.pdf.

altered). As the Ninth Circuit explained below, "these regulations don't require the slaughter of downer animals; no slaughterhouse operator would be fined by federal authorities if he gave nonambulatory animals medical care and put them up for adoption as pets. Federal regulations require inspection *if* downer animals are to be slaughtered." Pet.App.12a. That conclusion was central to the Ninth Circuit's rejection of NMA's conflict preemption arguments, and neither NMA nor the United States challenge it before this Court.

D. This Action

NMA filed this action against the state respondents nine days before the 2008 amendments to §599f were to take effect and 14 years after §599f originally took effect. Compl., No. 08-1963, Dkt. 1. Petitioner requested broad injunctive relief against the application of §599f to federally-inspected swine slaughterhouses in California. *Id.* at 5. The non-state respondents intervened as defendants. Mot. to Intervene, No. 08-1963, Dkt. 46.

On February 19, 2009, the district court granted NMA's motion for a preliminary injunction in full. Pet.App.53a. The court found that petitioner was likely to succeed on its claim that the entirety of §599f is expressly preempted as applied to swine slaughterhouses, because the statute "requires *meat products* to be handled in a manner other than that prescribed by the FMIA or the USDA regulations" and therefore "imposes inspection requirements upon federally inspected slaughterhouses which are in addition to or different than FMIA." Pet.App.36a-37a (emphasis added). The district court also held that §599f is impliedly preempted because the FMIA

contains "*comprehensive requirements for meat inspection, handling and processing*" and §599f "imposes different or additional requirements on inspection, handling and processing meat." Pet.App.42a. The district court did not reach NMA's separate arguments that §599f violates the dormant commerce clause and/or is unconstitutionally vague. Pet.App.43a.

In an interlocutory appeal, the Ninth Circuit reversed the district court's grant of a preliminary injunction. The Ninth Circuit recognized that petitioner's arguments pertained only to "section 599f(a)-(c)'s ban on the receipt and slaughter of downer animals," and §599f(e)'s prohibition on dragging nonambulatory animals. Pet.App.17a. It held that NMA is not likely to succeed on its claim that the "receipt and slaughter" provisions are expressly preempted, because those provisions do not "require *any* additional or different inspections than does the FMIA," and do not regulate "'premises, facilities and operations' of slaughterhouses" within the scope of the FMIA. Pet.App.11a. In addition to a careful analysis of the text and purposes of the FMIA, the Ninth Circuit relied on the existing case law holding that state statutes prohibiting the slaughter of a particular kind of animal are not preempted by the FMIA. Pet.App.9a-10a.

With respect to petitioner's implied preemption arguments, the Ninth Circuit recognized that it is "not physically impossible to comply with both section 599f and the FMIA" because "nothing in the FMIA *requires* the slaughter of downer animals for human consumption. . . . Whether they may be slaughtered is up to the states." Pet.App.12a-13a. The court further

held that "NMA's implied preemption claim concerning section 599f's ban on the receipt and slaughter of nonambulatory animals fares no better," because the purpose of the FMIA "is certainly not to preserve the slaughter of any kind of animal for human consumption." Pet.App.11a-14a. The court of appeals acknowledged NMA's argument "that section 599f will prevent the examination of downer animals for disease, hindering federal procedures designed to identify and stem the spread of disease." Pet.App.15a n.7. But it noted that "[n]othing in the record substantiates this concern," and that §599f "doesn't prohibit post-mortem inspection of downer animals." *Id.*

The Ninth Circuit held that NMA was likely to succeed on its arguments that §599f(e)'s ban on dragging nonambulatory animals is expressly preempted, but held that the plaintiffs had not shown that they would be irreparably injured by that provision or that the balance of equities favored a preliminary injunction. Pet.App.16a-17a. NMA did not seek review of that holding. NMA also has abandoned its implied preemption arguments before this Court. NMABr.20 n.10.

SUMMARY OF ARGUMENT

This case is very narrow. It concerns only whether certain provisions of §599f(a), (b), and (c) are expressly preempted by 21 U.S.C. §678 as applied to certain pigs on the premises of federally-inspected slaughterhouses. Petitioner and the United States concede that §599f can be applied away from the slaughterhouse to stockyards, auctions, market agencies, dealers, farmers, and trucking companies. They appear to concede that §599f's regulation of what animals slaughterhouses can *purchase* is not preempted, if the

transaction occurs off the premises. U.S.Br.23 n.7. They concede that no conflict preemption issues are before this Court. The United States concedes that, as a general matter, the FMIA does not preempt state regulation of the commercial sales activities of slaughterhouses. U.S.Br.17. And it concedes that state animal cruelty laws can be applied directly to animals in slaughterhouses, if the animals' treatment would also have violated federal humane handling regulations. U.S.Br.26.

This Court should consider the particular disputed subsections of §599f, under the narrow circumstances presented, separately and carefully. None are expressly preempted under an appropriate understanding of 21 U.S.C. §678, particularly in light of the traditional rule—now undisputed in this case—that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (citation omitted).

The "receipt" provision in §599f(a) just tells slaughterhouse workers that if a truck shows up with pigs that cannot stand those animals cannot be received, which in effect means the livestock dealer (or dealer's agent responsible for transport) must euthanize these animals. Cal. Penal Code §599f(c), (f). It is no more a regulation of slaughterhouse "operations" or within the "scope" of the FMIA than a law requiring the slaughterhouse to turn away a truck that shows up full of kittens or stolen pigs. Slaughterhouse "operations" are the "practical work" of turning animals into meat, NMABr.33 & n.12; U.S.Br.14, and the "scope" of the FMIA is an

inspection process that must be followed in order to protect the public from tainted or unsafe meat. Section 599f(a)'s receipt provision identifies a category of animals that the people of California believe should not be slaughtered on moral grounds, by reference to an unambiguous characteristic that can be produced by agricultural and transport conditions that California is entitled to regulate, and that has manifested itself before those animals arrived at the slaughterhouse. Laws of that nature are not preempted, just like laws banning the slaughter of horses, dogs, and cats.

NMA suggests that §599f(a) is preempted because inability to stand or walk may be a "symptom" of disease, and because identifying pigs that may produce adulterated meat due to disease *is* an aspect of slaughterhouse operations and within the scope of the FMIA's regulation. But pigs become nonambulatory for many different reasons, and §599f(a) does not attempt to identify diseased animals or animals whose meat may be adulterated. It bars slaughterhouses from receiving *all* nonambulatory animals, because their condition means that efforts to move them off the truck will cause excessive suffering.

Section 599f(a)'s prohibition against purchasing nonambulatory animals is functionally similar to the receipt provision and not preempted for the same reasons, since NMA admits that pigs are typically purchased upon arrival or shortly thereafter. That provision also is a reasonable exercise of California's authority to regulate commerce in agricultural livestock. The United States concedes that state regulation of a slaughterhouse's "commercial sales activities" is not preempted. U.S.Br.17. Commercial *purchasing* activities are similarly not a part of

slaughterhouse "operations" and similarly not within the scope of the FMIA. Indeed, NMA and the United States appear to accept that California may prohibit the purchase and sale of nonambulatory animals away from the slaughterhouse. But the fact that a truckload of animals makes it onto slaughterhouse grounds does not transform purchasing into slaughterhouse "operations" or bring it within the scope of the FMIA.

Section 599f(b)'s ban on the sale of meat products derived from nonambulatory animals also is not a regulation of the "operations" of the slaughterhouse and is outside the FMIA's scope. The United States forthrightly concedes that "[t]he FMIA does not in general expressly preempt state regulation of the commercial sales activities of slaughterhouses." U.S.Br.17. The government offers contorted arguments that this particular sale regulation must be understood as something else, because as a practical economic matter it will induce slaughterhouses to voluntarily change what they do. This Court rejected a very similar argument in *Bates v. Dow Agrosciences LLC*, and held that a state law did not impose any "requirements" related to pesticide labeling merely because, as a practical matter, it would induce the manufacturer to change its label voluntarily. 544 U.S. 431, 445-46 (2005). The government is really saying that §599f's regulation of meat sales will, as a practical matter, frustrate the federal objectives underlying the FMIA—a conflict preemption issue. But petitioner has renounced any conflict preemption arguments before this Court, and for good reason. The FMIA is entirely unconcerned with maximizing the supply of meat, or with protecting slaughterhouse profits. Its only purpose is to protect the public from tainted or

unwholesome meat, and to ensure that animals who become meat are slaughtered humanely. Section 599f does not frustrate those objectives. As applied to purely intrastate meat sales, the government's expansive preemption theory also raises serious Commerce Clause questions that should be avoided.

NMA and the government suggest that §599f(c), which requires humane euthanasia of nonambulatory livestock, overlaps with the scope of 21 U.S.C. §§603(b) and 610(b), which were added by the 1978 amendments to the FMIA and HMSA and require methods of "slaughter" and "handling in connection with slaughter" to be consistent with humane methods designated by the Secretary under the HMSA. Animals that are excluded from slaughter entirely, by state laws like §599f that are outside the regulatory scope of the FMIA, are not handled "in connection with slaughter" and their disposition is not an aspect of slaughterhouse "operations."

Finally, the public health arguments advanced by petitioner and its *amici* have not been tested through any evidentiary process and are baseless. The FMIA and federal regulations always allow slaughterhouses to voluntarily withdraw animals from the slaughter process without ante-mortem inspection. Notifying state and federal officials of the possibility of a contagious disease outbreak thus is at most a side benefit of the FMIA inspection regime, not a necessary or central feature. And §599f might prevent federal inspectors from seeing, while they are still alive, just a very small percentage of the thousands of animals that pass through the slaughterhouse every day. FSIS's own practical advice on this issue is simply that "plant and FSIS inspection personnel should be alert to the

possibility that the presence of a foreign animal disease might go unnoticed when the plant handles or processes condemned livestock without inspection. Such concerns are worthy of discussion at plant and work unit meetings."[34] FSIS even *requires* prompt euthanasia of nonambulatory cattle, and cattle are subject to diseases similar to the swine diseases *amici* identify, including foot-and-mouth disease. Post-mortem inspection is always available, and is adequate to identify most important symptoms. Section 599f does not impair the existing federal regulatory regime in any significant respect.

ARGUMENT

The parties and the United States agree on the governing interpretive principles. "'[T]he States are independent sovereigns in our federal system,'" *Bates*, 544 U.S. at 449 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 479, 485 (1996)), and this Court will not find that federal law preempts state law "unless Congress has made such an intention 'clear and manifest,'" *id.* at 449 (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading," this Court presumes that Congress did not intend to displace state law. *Altria*, 555 U.S. at 77. "That assumption applies with particular force when," as here, "Congress has legislated in a field traditionally occupied by the States." *Id.*; *supra*, at 14-15.

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[34] FSIS, USDA, Questions and Answers, FSIS Directive 6100.1 Rev. 1 Ante-mortem Condemnation #1, http://askfsis.custhelp.com/app/answers/detail/a_id/1193 (last visited Sept. 30, 2011) ("FSIS, Questions and Answers, *FSIS Directive 6100.1*").

Petitioner therefore must show that the FMIA contains a "nonambiguous command to pre-empt" each of the disputed provisions. *Bates*, 544 U.S. at 449.[35]

"[A]ny understanding of the scope of a pre-emption statute must rest primarily on a 'fair understanding of *congressional purpose*.'" *Medtronic*, 518 U.S. at 485-86 (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 529 n.27 (1992)). This Court will look to legislative history to inform that "fair understanding." *See, e.g.*, *Bates*, 544 U.S. at 452 n.26 (legislative history supported the Court's interpretation of the FIFRA preemption clause); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 745-47, 752-57 (1985) (discussing the legislative histories of ERISA and the NLRA to support holding that state law was not expressly preempted by those statutes), *overruled in part on other grounds*, 538 U.S. 329 (2003). And when, as here, the statute also includes a savings clause, this Court disfavors interpretations that leave that clause with no important scope of operation. *E.g.*, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 867-68 (2000) (savings clause indicates Congress's belief "that there are some significant number of . . . cases to save").

Congress plainly did not intend for 21 U.S.C. §678 to preempt all state regulation of slaughterhouses, or all state regulation that affects slaughterhouses. NMA concedes, for example, that state building codes,

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[35] NMA argues that this Court already held, in *Rath Packing*, that 21 U.S.C. §678 expresses an unambiguous preemptive command. NMABr.21, 54. The fact that §678 clearly preempts *some* state law does not mean it clearly preempts *every* state law. *Rath Packing* did not even interpret the language at issue here, and has no bearing on this case.

workplace safety requirements, and general criminal laws are not preempted—even as applied to the premises, facilities, and operations of slaughterhouses. NMABr.58 n.20. Any workable interpretation of the FMIA's preemption provision therefore requires careful attention to the activities embraced within slaughterhouse "operations" and to the "scope" of the FMIA—which is best understood as the constellation of regulatory subjects that the FMIA addresses and the problems that it attempts to solve. Section 678 clearly would not, for example, preempt a state statute barring slaughterhouses from receiving or purchasing stolen pigs, and from selling meat products derived from stolen pigs. The FMIA imposes no requirements dealing with stolen pigs, and does not attempt to solve the problem of agricultural theft.

This Court often recognizes that state law is not expressly preempted when it establishes a legal duty with a fundamentally different scope or objective than the federal law. In *Altria*, for example, this Court held that a federal law preempting state advertising requirements "based on smoking and health" did not preempt application of Maine's Unfair Trade Practices Act to a cigarette advertisement making allegedly misleading claims about light and low-tar cigarettes. 555 U.S. at 80-83. The state's separate regulatory interest in preventing *deception* could be applied to smoking advertisements even though the subject of the alleged deception related to the relationship between smoking and health. *Id.* And in *Medtronic* this Court explained that the statute's "overarching concern that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest" meant that the preemption analysis

"require[d] a careful comparison between the allegedly pre-empting federal requirement and the allegedly pre-empted state requirement to determine whether they fall within the intended pre-emptive scope of the statute." 518 U.S. at 500.

The "operations" and "scope" language in 21 U.S.C. §678 require a similarly careful analysis of each of §599f's subsections and how they relate to the legal duties that the FMIA imposes and the regulatory subjects that the FMIA was, and was not, designed to address. NMA and the United States agree that the "operations" of a slaughterhouse are the "practical work" of turning animals into meat, and that requirements "with respect to . . . operations" are those that "address[] practical aspects of how slaughterhouses must handle animals in connection with slaughter, and the conditions under which processing of the carcasses into meat and meat food products can occur." U.S.Br.14; *see also* U.S.Br.24 (explaining that 21 U.S.C. §623(a) uses the term "operations" to refer to "'the slaughter of animals and the preparation of the carcasses, parts thereof, meat and meat food products'") (citation omitted). In a similar vein, the "scope" of the FMIA covers a system of requirements aimed at ensuring the safety of meat for human consumption and, following the 1978 amendments, "preventing the inhumane slaughtering of livestock" or inhumane "handl[ing] in connection with slaughter." 21 U.S.C. §603(b). Properly understood, the disputed subsections of §599f do not regulate slaughterhouse "operations" and are outside the scope of the FMIA.

I. §599F'S BAN ON RECEIVING NONAMBULATORY ANIMALS IS NOT PREEMPTED

Section 599f(a) provides that "[n]o slaughterhouse . . . shall . . . receive a nonambulatory animal." That provision just withdraws a readily identifiable category of animals from the slaughter process entirely, because of moral considerations that are outside the scope of the FMIA's concerns. And it does so at the earliest possible point in the process following transport. *See supra*, at 9-11.

1. A slaughterhouse's decision to turn away an animal or group of animals prior to ante-mortem inspection is not a regulated aspect of slaughterhouse "operations" or within the "scope" of the FMIA. The FMIA provisions and regulations governing ante-mortem inspection apply only to "livestock *offered for slaughter* in an official establishment." 9 C.F.R. §309.1(a) (emphasis added). If a slaughterhouse intends to sell an animal's meat for human consumption in interstate commerce, it must follow these regulations. But if a slaughterhouse decides instead to euthanize certain animals or keep them for other reasons, the regulations do not apply. *See id.* ("All livestock *offered for slaughter* in an official establishment shall be examined and inspected on the day of and before slaughter . . . .") (emphasis added). Nothing in the FMIA or regulations *requires* a slaughterhouse to present any animal or class of animals for inspection and slaughter. *See supra*, at 23-24; Pet.App.12a. And a state law regulating the slaughterhouse's exercise of discretion on an issue outside the scope of the FMIA is, itself, also outside the scope of the FMIA. *See* Pet.App.14a ("Nor do we see

any indication that Congress intended to leave the choice of what kind of animals to slaughter to individual slaughterhouses.").

The fact that the receipt provision applies only to animals who *arrive* in nonambulatory condition underlines that California's regulatory interests here have nothing to do with slaughterhouse operations or the scope of the FMIA. Prior to entering a federally-inspected facility, the animal and its treatment unquestionably fall within the historic police power of the states. These animals generally become nonambulatory because something about their genetic makeup, past husbandry, transport conditions, or other factors occurring *outside* the federally-inspected facility left them weak and vulnerable to collapse. California would be entitled to regulate those issues directly, and to post inspectors on every farm, at every auction, and on every truck. (NMA and the United States conspicuously do not challenge §599f's provisions that prohibit the sale or transport of nonambulatory animals outside the slaughterhouse.) Section 599f(a)'s receipt provision just pursues those regulatory objectives in a far more efficient and effective way, by ensuring that farmers, dealers, and trucking companies have appropriate economic incentives to treat these animals humanely.

2. Petitioner points to FSIS's directive, amended after review was granted in this case, *see* Directive 6900.2, Rev.2, Ch.II, I (effective Sept. 15, 2011), which now provides that "'[o]nce a vehicle carrying livestock enters, or is in line to enter, an official slaughter establishment's premises, the vehicle is considered to be a part of that establishment's premises.'" NMABr.45. Turning away animals that are ineligible

to be processed into meat under state law is not slaughterhouse "operations" or within the "scope" of the FMIA even if it occurs on the "premises." NMA correctly concedes that states may regulate many things that happen on slaughterhouse premises. NMABr.58 n.20.

Regardless, the directive is an arbitrary *ipse dixit* and not entitled to deference. Administrative action "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). FSIS directives "are not regulations and do not carry the force of law," but instead are simply "documents that FSIS issues to provide instructions to its personnel in carrying out FSIS functions."[36] Such "'interpretations contained in policy statements, agency manuals, and enforcement guidelines,'" issued without notice-and-comment procedures, are generally "beyond the *Chevron* pale." *Mead*, 533 U.S. at 234 (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)).

3. The two leading cases interpreting this preemption clause, prior to the decision below, both correctly held that state laws prohibiting the slaughter of horses and the sale of horse meat are not preempted, because the "[FMIA] is concerned with inspecting premises at which meat is produced for human

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[36] FSIS, USDA, *Regulations & Policies: Policy Development Process. FSIS Directive 1232.4* (Nov. 20, 2001), *available at* http://www.fsis.usda.gov/Regulations_&_Policies/Policy_Development_Process/index.asp.

consumption, ... rather than with preserving the production of particular types of meat for people to eat." *Cavel*, 500 F.3d at 554. Neither NMA nor the United States overtly disagree with *Cavel* and *Empacadora*, and the distinctions they point to are semantic and irrelevant to the real issues.

NMA suggests that nonambulatory pigs, unlike horses, are not a "kind of animal." NMABr. 58-59. But the FMIA regulations themselves identify nonambulatory animals as a distinct category for some purposes, *see* 9 C.F.R. §§309.2(b), 309.3(e), and under its "Revised Animal Welfare Requirements" USDA refuses to buy meat produced from nonambulatory pigs for its own nutrition programs—rendering the United States's effort to block California from adopting similar measures the height of hypocrisy.[37]

The United States concedes that "the bans at issue [in *Cavel* and *Empacadora*] did not require anything different from federal law with respect to slaughterhouse operations within the FMIA's scope," but attempts to distinguish those laws from §599f on the ground that the quality of being a horse "is immutable and known to all involved well before the animal is within the physical or regulatory reach of the FMIA." U.S.Br.27-28. The United States chastises the Ninth Circuit for focusing on distinctions that have "no statutory basis" and that are "fundamentally unhelpful," U.S.Br.27, but then commits precisely that error itself. Nothing in 21 U.S.C. §678 makes

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[37] *See* Agriculture Marketing Service, USDA, *Notice to the Trade: Implementation of Revised Animal Welfare Requirements* [sic] 2 (Dec. 2008), *available at* http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5074243.

preemption turn on whether characteristics are mutable or immutable. In any event, when a nonambulatory pig arrives on a truck its condition *is* "known to all involved before the animal is within the physical or regulatory reach of the FMIA" and, if §599f(a) was respected, that condition would never "change even while the animal is on the premises of a federally regulated slaughterhouse." U.S.Br.28. At least as applied to those animals, the government's reasoning is circular.

NMA argues that §599f(a) is within the scope of the FMIA because a pig's nonambulatory condition may be a "symptom" of disease. The FMIA does establish processes for the identification of animals suffering from disease, in order to ascertain whether that animal's meat would be unsafe for human consumption. But §599f does not establish additional or different criteria for the identification of disease or of adulterated meat. Livestock become nonambulatory for many different reasons, and §599f does not attempt to identify if the animal is diseased. Section 599f(a) instead establishes a state law duty that slaughterhouses may not receive nonambulatory animals (whether diseased or not) because of humane objectives outside the FMIA's scope.[38] A

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[38] The fact that §599f's sponsors *also* believed that permitting slaughterhouses to process nonambulatory animals would pose public health issues that are closer to the heart of the FMIA's concerns does not invalidate the law's independent moral justifications. State laws prohibiting the slaughter of dogs and cats for human consumption would not become preempted just because legislators also believed their meat was unhealthy. *See, e.g.*, Miss. Code Ann. §97-27-19 (prohibiting the sale as human food of any "dog, cat, or other like unclean animal").

nonambulatory pig is a living, sentient being who has become helpless, may be suffering extreme pain, and is unable to move on her own. The people of California have decided to exempt nonambulatory pigs from the slaughter process in large part because of an unacceptable risk that those pigs, in particular, will endure great suffering during the slaughter process.

In that respect this case resembles *Altria*, where federal preemption of state law requirements "based on smoking and health" did not encompass a state tort action based instead on a state law duty to refrain from deceptive advertising. Section 599f requires slaughterhouses to consider a *fact* (inability to stand and walk) that may also be relevant to the federal inspection regime. But §599f considers that fact under criteria, and to achieve regulatory objectives, that are outside the scope of the FMIA. A state law that attempted to usurp the federal inspection process by substituting more stringent criteria for the identification of tainted meat might well be preempted. *See* Pet.App.10a-11a. But §599f is not that sort of law.

4. NMA and the United States argue that §599f imposes requirements within the scope of the FMIA because 21 U.S.C. §§603(b) and 610(b) require humane methods of slaughter and handling in connection with slaughter. Certainly the FMIA now embraces certain humane treatment objectives, and that fact makes this case more difficult than *Cavel* and *Empacadora*—where the state law against horse slaughter reflected not just humane concerns but a strong and distinct moral judgment that humans should not eat animals that we keep as companions and with whom we have

strong emotional connections. The FMIA does not cover or address that latter subject at all.[39]

Just like the inspection provisions, the humane handling provisions apply only to animals that are being slaughtered or handled *in connection with slaughter*. As explained above, a law prohibiting slaughterhouses from receiving nonambulatory animals does not regulate slaughterhouse "operations" within the meaning of the FMIA—the "practical work" of turning animals into meat. Preventing an animal from entering the slaughterhouse at all, because it is ineligible to be slaughtered under a state law regulating subjects outside the scope of the FMIA, is not a regulation of "handling in connection with slaughter" and therefore is outside the "scope" of 21 U.S.C. §§603 and 610. And the requirements imposed by 21 U.S.C. §§603(b) and 610(b) also are not part of the "scope of this Act" within the meaning of 21 U.S.C. §678. Those cross-references refer to the HMSA as an entirely distinct "Act"—the "Act of August 27, 1958." Congress pointedly did not move the HMSA into chapter 12 of 21 U.S.C., and it remains codified in an entirely different volume of the U.S. Code. At a minimum, the application of the FMIA's preemption provision to laws of this nature is ambiguous, and the

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[39] The FMIA does limit slaughter to certain "amenable species" designated by statute and by USDA. *See* 21 U.S.C. §601(w). But that designation merely identifies species that can be slaughtered without violating the FMIA's own policy objectives. USDA has never contended that its theoretical authority to decide that dogs and cats are "amenable" to slaughter, for federal purposes, preempts state law forbidding such appalling practices on moral grounds. Horses are an "amenable species," and the United States does not contend that *Cavel* and *Empacadora* were wrongly decided.

presumption against preemption applies to protect §599f. *Bates*, 544 U.S. at 449.

The legislative history of the 1978 amendments confirms that Congress expressed no manifest, unambiguous intent to preempt state laws of this nature. Those amendments required federally-inspected slaughterhouses to comply with the slaughter and "handling in connection with slaughter" practices approved by the Secretary under the 1958 HMSA. But the 1958 HMSA merely established minimum federal standards for the humane treatment of animals that were destined to be turned into meat that the United States itself would purchase. Congress recognized that "virtually all States" had enacted laws to address animal cruelty and that "many" of those laws applied to slaughterhouses. H.R. Rep. No. 85-706, at 131. Congress did not include a preemption provision, and stopped short of imposing criminal penalties at least in part because of federalism concerns "in an area where the States not only have authority to act but where they have exercised that authority." *Id.* at 132.

There is zero indication in the legislative history that the 1978 Congress believed it was, for the very first time, making the floor a ceiling and preempting state animal cruelty laws or state laws specifying which animals are eligible for slaughter. To the contrary, the impetus for the law came largely from humane groups (including respondent HSUS) that would never have supported it if they had believed it would be interpreted to preempt state laws like

§599f.[40] Nor would preemption serve the HMSA's purposes. The original HMSA and the 1978 amendments were motivated entirely by a "growing national concern for the humane treatment of animals." S. Rep. No. 95-1059, at 2-3. Congress surely did not intend to immunize slaughterhouse workers from criminal responsibility for intentional and outrageous acts of cruelty to animals that, outside the slaughterhouse gates, would be crimes under state law.

In *Bates* this Court recognized that the "long history" of tort litigation in an area "adds force to the basic presumption against pre-emption" because "[i]f Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly." 544 U.S. at 449. Similarly here, Congress would not have nullified longstanding state laws prohibiting animal cruelty and the slaughter of particular kinds of animals for human consumption, in an amendment intended just to modestly *strengthen* protections for animal welfare, without "express[ing] that intent more clearly." *Id.*

II. §599F'S PROHIBITION AGAINST THE PURCHASE OF NONAMBULATORY ANIMALS IS NOT PREEMPTED

Section 599f(a) also provides that slaughterhouses, stockyards, auctions, market agencies, and dealers may not "buy" nonambulatory animals. That restriction is a reasonable exercise of California's authority to regulate agriculture and, as applied to slaughterhouses, functionally similar to §599f(a)'s receipt provision.

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[40] *See, e.g.*, H.R. Rep. No. 85-706, at 131; *Hearing on S.1213*, 85th Cong. 29-36 (statement of Fred Myers, Executive Director, HSUS).

Again, this Court should begin by recognizing that California clearly has authority to regulate the condition of animals that can be bought and sold away from the slaughterhouse, at farms, markets, and auctions. NMA and the United States carefully avoid addressing this issue, *see* NMABr.46-47 n.18; U.S.Br.23 n.7, but regulation of livestock husbandry is a traditional state function entirely outside the scope of the FMIA or anything that can fairly be considered slaughterhouse "operations." If a slaughterhouse's purchases of swine at a far-off auction is slaughterhouse "operations" then presumably so are its purchases of feed and equipment, and the FMIA would give slaughterhouses an exemption from all state regulation of agriculture and commerce. The United States concedes that a slaughterhouse's commercial sales activities are outside the scope of the FMIA, and the same is true of *purchasing* activities.

NMA and the United States focus on purchases that occur after the animals arrive—"upon receipt or, as is typical, after successful ante-mortem inspection." NMABr.47 n.18. But the state and federal interests involved do not change markedly just because a truck containing animals that could not be lawfully purchased off the property happens to make it onto the slaughterhouse grounds, or just because a slaughterhouse cleverly drafts its purchase orders so that title does not shift until arrival. NMA concedes that geography is not decisive; plenty of state laws apply on slaughterhouse premises, if they do not regulate slaughterhouse operations or are outside the scope of the FMIA. NMABr.58 n.20. Congress surely did not intend to preempt state regulation of otherwise criminal commercial transactions, merely because the

perpetrators stepped onto slaughterhouse grounds when the money changed hands. And slaughterhouses will never be in the position of *buying* an animal that has become nonambulatory only later, due to conditions in the slaughterhouse itself.

III. §599F(B)'S BAN ON THE SALE OF MEAT PRODUCED FROM NONAMBULATORY ANIMALS IS NOT PREEMPTED

Section 599f(b)'s ban on selling meat or products of nonambulatory animals for human consumption also is not preempted, because commercial sales activity is not slaughterhouse "operations" and is outside the scope of the FMIA.

1. As the government concedes, "[t]he FMIA does not in general expressly preempt state regulation of the commercial sales activities of slaughterhouses." U.S.Br.17. The FMIA uses "operations" to refer to the "practical aspects of how slaughterhouses must handle animals in connection with slaughter and the conditions under which processing of the carcasses into meat and meat food products can occur," U.S.Br.14, and its "scope" is a series of inspection and handling requirements that must be satisfied before meat can be sold for human consumption. Once meat has been inspected and labeled in accordance with the FMIA, that statute is not concerned with whether or how it is ever actually sold. Just as there is no requirement for any slaughterhouse to slaughter any particular animal, neither is there any federal requirement that slaughterhouses sell the meat they produce, because that conduct is outside the scope of the FMIA.

2. NMA's elaborate textual argument about 21 U.S.C. §642, *see* NMABr.34-35, establishes at most that *record-keeping* is an aspect of slaughterhouse

operations. NMA's contention that anything a slaughterhouse keeps records about under §642 ("all transactions involved in their businesses") is *itself* slaughterhouse "operations" proves far too much—which, presumably, is why the United States rejects NMA's premise. NMA's theory would, for example, preempt state worker's compensation law because the slaughterhouse kept records of payments. It would also mean that a wide variety of activities declared criminal under state law could be conducted by slaughterhouses without any fear of state prosecution, including extortion, fraud, bribery, and the physical abuse of slaughterhouse workers. Congress obviously did not intend such a sweeping result from the FMIA's narrowly drawn preemption clause.

3. Nor is §599f(b) preempted because, as a practical economic matter, it will incentivize slaughterhouses not to process meat from nonambulatory animals. Prohibitions that merely impose indirect economic pressure on actions are not requirements with respect to those actions. This Court has confirmed in the preemption context that a constraint "that merely motivates an optional decision does not qualify as a requirement." *Bates*, 544 U.S. at 433.

Bates involved the express preemption clause in the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), which provides that a "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. §136v(b). The Fifth Circuit held that FIFRA preempted Texas farmers' state law claims arising from damage to their crops caused by application of Dow's pesticide because "a finding of liability on these

claims would 'induce Dow to alter [its] label.'" *Bates*, 544 U.S. at 445 (citation omitted). This Court rejected the Fifth Circuit's approach to express preemption as "unquestionably overbroad." *Id.* This Court explained that the preemption clause spoke only to "requirements," which are "rule[s] of law that must be obeyed." *Id.* The lawsuits might, as a practical matter, induce Dow to change its label, but the farmers' causes of action did not rest on legal duties that imposed "requirements for 'labeling or packaging.'" *Id.* at 444.

This Court's opinions in *Cipollone* and *Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246 (2004), are not to the contrary. The issue in *Engine Manufacturers* was whether California's restrictions on the purchase of vehicles that failed to meet certain state emissions standards were preempted by the Clean Air Act, which expressly preempts any state "'standard relating to the control of emissions.'" 541 U.S. at 251 (quoting 42 U.S.C. §7543(a)). As this Court recognized, there was simply no support in the statutory text for the State's argument that the standards preempted by this provision were only those governing vehicle production methods. *Id.* at 255. This Court did not hold, as the United States implies, that the state law was preempted because it would impose indirect economic pressure on manufacturers. This Court held that a law governing what cars may be purchased was, itself, a "standard relating to the control of emissions." *Id.* at 252-55.

The United States's discussion of *Cipollone* misunderstands this Court's holding. *Cipollone* held that a state tort action may impose "requirements" "based on smoking and health" no less than a state

statute, *if* the "legal duty that [was] the predicate of the common-law damages action" was a duty based on smoking and health. 505 U.S. at 523-24. As this Court later explained when discussing *Cipollone* in *Bates*, "[a] requirement is a rule of law that must be obeyed." *Bates*, 544 U.S. at 445. State law does not impose requirements with respect to pesticide labels merely because the state law will create an economic incentive for the manufacturer to change its label. The focus is always on what conduct the state law duty *directly* pertains to. When the United States argues here that any state law that "exerts clear and focused economic pressure of the conduct of a federally regulated activity is no less a 'requirement' with respect to that activity than a direct prescriptive regulation would be," U.S.Br.20, it is attempting to revive the exact same "effects-based" misreading of *Cipollone* that this Court rejected in *Bates*. *See* 544 U.S. at 445.

4. Section 599f(b) also is not "an impermissible effort to add a class of adulteration unrecognized in federal law." U.S.Br.17. Section 599f does not establish criteria for the identification of adulterated meat, but instead for the identification of meat that has been produced in violation of important state policies that have nothing to do with adulteration. In that respect it resembles state law prohibiting the sale of meat derived from stolen animals, or laws prohibiting the sale of horsemeat or dog meat.[41] The *Empacadora*

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[41] *See* Tex. Agric. Code Ann. §149.002 (making it unlawful to "sell[], offer[] for sale, or exhibit[] for sale horsemeat as food for human consumption," or to "possess[] horsemeat with the intent to sell the horsemeat as food for human consumption"); Ga. Code Ann. §26-2-160 (prohibiting sale of dog meat for human consumption).

court correctly reasoned that the FMIA's preemption clause is "naturally read as being concerned with the methods, standards of quality, and packaging that slaughterhouses use" rather than limiting "states in their ability to regulate what types of meat may be sold for human consumption in the first place." 476 F.3d at 333. The United States admits that the law at issue in *Empacadora* "did not require anything different from federal law with respect to slaughterhouse operations within the FMIA's scope." U.S.Br.27-28. The same is true of §599f(b).

5. The United States tellingly retreats, in a footnote, to an argument that §599f(b) is "likely" preempted under conflict preemption principles. U.S.Br.21 n.5. That is the real gravamen of its arguments, and NMA's. The availability of conflict preemption analysis of course disproves the United States's suggestion that if this sale ban is not expressly preempted then "nearly any state slaughterhouse regulation" could escape preemption if "recharacterize[d] . . . as a ban on downstream sales of products produced in a manner disapproved by the State." U.S.Br.18. But NMA has affirmatively renounced any conflict preemption arguments before this Court. This Court should not attempt to reach questions that are not presented, but in an appropriate case these arguments would be rejected. As the Ninth Circuit correctly held, there is no direct conflict between §599f and federal law. Pet.App.11a. The FMIA and the federal regulations do not *require* slaughterhouses to process nonambulatory animals into meat, or to sell any meat that results. And §599f(b) does not stand as an obstacle to the FMIA's purposes, which are entirely focused on protecting consumers

from tainted or adulterated meat, not with maximizing the meat supply or protecting slaughterhouse profit margins.

6. Finally, as applied to sales in California NMA's arguments raise serious constitutional questions that should be avoided by a more restrained interpretation of the preemption clause. Congress's power to regulate intrastate meat sales rests on findings that the intrastate marketing of *adulterated* meat could impact interstate commerce by weakening consumer confidence. *See* U.S.Br.7 (citation omitted). But the absence from the California market of perhaps 1% of the meat that federal law would have considered *not* adulterated will have no meaningful impact on interstate commerce. This is not an area where the efficient functioning of interstate commerce requires uniformity. The FMIA explicitly permits states to adopt more rigorous meat inspection requirements for intrastate sales. U.S.Br.7-8. And since the FMIA preempts state labeling requirements, NMA's position would mean that California cannot even identify for its citizens the meat that they do not wish to purchase—meat that the federal government will not purchase itself. There are at least serious questions whether Congress has the power to effectively force state consumers to purchase goods, produced in their state, that they do not wish to purchase. *See, e.g., Florida v. United States Dep't of HHS*, Nos. 11-11021, 11-11067, 2011 U.S. App. LEXIS 16806, at *239-40 (11th Cir. Aug. 12, 2011).

IV. §599F(B)-(C) ARE NOT PREEMPTED AS APPLIED TO ANIMALS THAT BECOME NONAMBULATORY AFTER ARRIVAL

As applied to animals that become nonambulatory only *after* arrival and initial inspection, §599f(b) and (c) present closer preemption questions. Together those provisions require slaughterhouses to euthanize animals that the federal regulations might allow them to segregate and hold for possible reinspection and reintroduction into the slaughter process. Nonetheless, these provisions are best understood as regulating the treatment of animals that have been taken outside the scope of the FMIA altogether by §599f's other provisions.

The receipt, slaughter, and sale bans of §599f(a) and (b) ensure that nonambulatory pigs cannot be slaughtered for human consumption. Slaughterhouse "operations" are the "practical work" of turning animals into meat—the treatment of animals that will not be presented for inspection and slaughter is not part of slaughterhouse "operations." The fact that an FSIS Directive (which does not carry the force of law) requires humane treatment of "'[a]ll animals that are on the premises of the establishment,'" U.S.Br.22 (quoting *FSIS Directive 6100.1* at 4; NMABr.App.47), does not mean that the treatment of every animal on slaughterhouse grounds is slaughterhouse "operations" or within the scope of the FMIA. An animal that cannot be slaughtered also cannot be handled "in connection with slaughter" within the meaning of 21 U.S.C. §§603 and 610. And the preemptive "scope of this Act" described by 21 U.S.C. §678 was never intended to encompass the humane handling practices

specified by the different "Act of August 27, 1958." *Supra*, at 41-42.

The text of the FMIA is at least ambiguous on these issues, and the legislative history reveals absolutely no hint that Congress believed that any of these statutes would displace state animal cruelty law or state law regulating the kinds of animals that can be slaughtered for human consumption. Particularly in an area so close to the heart of traditional state authority and regulation, this Court should apply the usual presumption that Congress does not intend to preempt state law unless it makes that intention clear and manifest. Congress is well acquainted with that longstanding principle, and it provides an excellent guide to a "'fair understanding of *congressional purpose*'" in this context. *Medtronic*, 518 U.S. at 485-86 (citation omitted).

V. THE POLICY CONCERNS RAISED BY NMA AND *AMICI* ARE OVERSTATED

NMA and its *amici* argue that §599f frustrates federal policies concerning uniformity, the detection of communicable disease, and the interaction between state and federal personnel. These concerns are greatly overstated. The issues that NMA and its *amici* identify are ordinary and manageable daily features of the current system and will remain so whether §599f(a)-(c) are preempted or not.

A. The FMIA Does Not Contemplate Uniform State Standards for Slaughterhouse Operations

NMA's concern with uniformity is a red herring. The United States and NMA acknowledge that states have the right to regulate many—if not most—aspects of animal and food production, sale, and purchase.

States can regulate the transport of animals to slaughterhouses. They can decide the type of meat that is sold in their stores, and the type of animals that are turned into meat. U.S.Br.17, 23 n.7. They can still regulate animal cruelty in line with the federal regulations. U.S.Br.26.

Slaughterhouses and their employees also are subject to myriad state laws governing other aspects of their work while engaged in slaughterhouse business. NMA concedes that "state building codes, workplace safety requirements, and general criminal laws" are outside the scope of the FMIA. *See* NMABr.58 n.20. The states can decide who works in the slaughterhouses, and for how long. They can force slaughterhouse workers to leave the slaughter line for mandatory breaks. They can require additional safety precautions and regulate compensation for workplace injuries. They can enforce state laws against physical assaults, theft, discrimination, and infliction of emotional distress. There is simply no protective federal bubble over everything that occurs inside a slaughterhouse. The only activity protected by the preemptive reach of §678 is the "practical work" of ensuring that animals that do go through the system, and the meat that does come out the other end, have been sufficiently tested to protect consumers.

Nor is there anything special about federal policy toward slaughterhouses that particularly requires uniformity of operations or regulation. Indeed, the United States repeatedly emphasizes that the FMIA would permit California to adopt its own separate, and potentially quite different, regime of inspection for intrastate slaughtering so long as it imposed "'requirements at least equal to those imposed under

[the FMIA].'" U.S.Br.8 (quoting 21 U.S.C. §661(c)(1)). Section 599f may perhaps slightly decrease slaughterhouse profit margins in California, but this is not a situation in which divergent state laws threaten to disrupt a complex federal regulatory scheme that requires uniformity for success. *Cf. Bruesewitz v. Wyeth*, 131 S. Ct. 1068, 1080 (2011).

B. Ante-mortem Inspection of All Pigs is Neither Guaranteed Nor Necessary

NMA and its *amici* raise the more serious issue that §599f(c) might, by requiring immediate humane euthanasia of nonambulatory pigs, prevent federal inspectors from detecting some communicable disease that could only be identified while the animal is alive. This concern is overstated.

First, the FMIA and federal regulations allow slaughterhouses to segregate nonambulatory pigs for reinspection and future slaughter, but they do not *require* slaughterhouses to do so. The FMIA and the FSIS regulations present few, if any, barriers to slaughterhouses deciding, at any point, to euthanize an animal instead. Slaughterhouses clearly have total discretion to refuse or euthanize an animals at the time of receipt or before ante-mortem inspection. And even after ante-mortem inspection the regulations allow state and local officials to authorize the release of animals for a purpose other than slaughter. *Supra*, at 23-24. If a slaughterhouse manager independently established a rule that "all animals who are or become nonambulatory shall be humanely euthanized," and state law supported that rule, federal law would not stand in the way.

Section 599f thus simply reflects certain possibilities inherent in the federal system. Indeed,

FSIS *requires* slaughterhouse to "promptly" euthanize cattle that become nonambulatory, and has made clear that "the establishment may elect to condemn and humanely destroy the non-ambulatory, disabled cattle before the PHV inspects and makes a disposition."[42] Cattle certainly get infectious diseases too, including the affliction that concerns NMA and its *amici* the most—vesicular or "foot and mouth" disease ("FMD").[43] FSIS directly addressed the concern that NMA and *amici* raise now:

> Question: Is the establishment allowed to withhold certain livestock from slaughter, humanely euthanize, and dispose of them without presenting them for FSIS inspection? Can FSIS require the establishment to present such animals for inspection to prevent an animal with a foreign animal disease from going unnoticed?
>
> Answer: Yes, the establishment may elect to humanely euthanize livestock and dispose of the carcasses without presenting them for FSIS inspection. However, as a result, plant and FSIS inspection personnel should be alert to the possibility that the presence of a foreign animal disease might go unnoticed when the plant handles or processes condemned livestock without inspection.

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[42] *See* 74 Fed. Reg. at 11,464; *FSIS Directive 6100.1* at 5.

[43] *See* FSIS, USDA, *Reportable and Foreign Animal Diseases* at 29 (2006), *available at* www.fsis.usda.gov/PDF/PHVj-Reportable_and_Foreign_Animal_Diseases.pdf; S. Alexandersen, 129 J. Comp. Pathology 1-36.

> Such concerns are worthy of discussion at plant and work unit meetings.

FSIS, Questions and Answers, *FSIS Directive 6100.1*. In other words, FSIS wisely regards the risk that a disease may go undetected because a relatively small percentage of cattle are euthanized without inspection as a modest concern, "worthy of discussion at plant and work unit meetings" but not a significant regulatory issue and not worth constraining slaughterhouse discretion or causing animals unnecessary suffering. FSIS has not addressed these issues as clearly with regard to pigs, but there too the regulations and directives appear to give slaughterhouses wide discretion to remove an animal from the scope of federal regulations and humanely euthanize it instead of sending it to slaughter. *Supra*, at 23-24.

The bottom line is that the FMIA's ante-mortem inspection process is designed to identify animals with potential problems that might result in tainted meat. "Advance warning" of possible communicable disease outbreaks may be a useful side effect of that process, but it is not a central or necessary purpose.

Second, NMA and its *amici* greatly overstate the significance of this issue in several respects. FMD poses no danger to human health; it is purely an economic issue for the industry that does not implicate the FMIA.[44] And as *amici* concede, AASVBr.11, 17, 18, an outbreak of FMD would almost certainly (1)

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[44] Animal and Plant Health Inspection Service ("APHIS"), USDA, *Fact Sheet: Foot-and-Mouth Disease* (Feb. 2007), *at* http://www.aphis.usda.gov/publications/animal_health/content/printable_version/fs_foot_mouth_disease07.pdf ("FMD is not recognized as a zoonotic disease.").

occur in a large number of animals in any population, and so be quite obvious[45]; and (2) be visible by reference to the vesicles (*i.e.*, blisters) on at least some of the affected animals. When animals become unable to walk *because of FMD*, as opposed to other causes, it is usually in part because they have developed blisters on their hooves that make walking painful. It is those vesicles, not the general symptom of lameness more commonly caused by injury or medical trauma, that will be the "bellwether" of FMD. And those vesicles can easily be identified postmortem. Hog cholera (or "Classical Swine Fever") also does not cause illness in humans,[46] and is generally diagnosed by examining tissue samples from an infected animal post-mortem.[47] The other diseases *amici* point to are not even among the significant causes of "fatigued pig" syndrome. *Supra*, at 5-6.

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[45] When FMD was detected in a slaughterhouse in England, twenty-seven animals were identified with outward signs of the disease. Soren Alexandersen et al., *Clinical and laboratory investigations of five outbreaks during the early stages of the 2001 Foot-and-Mouth disease epidemic in the United Kingdom*, 152 Veterinary Record 490 (2003). The AASV acknowledges that "all animals in a herd are infected" and logically a large percentage would show outward signs of disease by the time some of them could no longer stand.

[46] *See, e.g.*, APHIS, USDA, *Classical Swine Fever: Still a Threat* (Sept. 1999), *available at* http://www.aphis.usda.gov/publications/animal_health/content/printable_version/csfleaf.pdf ("CSF does not cause illness in people . . . .").

[47] J.A. Gardner et al., *Interpretation of Laboratory Results*, *Diseases of Swine*, *supra*, 267, Table 11.25.

More broadly, it certainly is not true that "[i]f [§599f] goes into effect, California will rely solely on a post-mortem inspection regime to detect swine diseases." AASVBr.6-7. Only a very small percentage of pigs arrive nonambulatory. *Supra*, at 10 n.21. An additional even smaller percentage may subsequently go down and be euthanized outside the presence of federal inspectors, but most of those animals have already been inspected once.

Finally, many of the indicia of disease for which NMA and its *amici* insist that ante-mortem inspection is essential cannot be observed in nonambulatory animals anyway. *See* AASVBr.8-10 (discussing FSIS guidelines suggesting that inspectors consider "signs associated with body movement, action and position," including "lameness or limping," "stiffness and pain," "stagger[ing] and circl[ing]," and "abnormal gaits"). Federal inspectors will know that the animal was unable to stand or walk, and would not have been able to gather much more information about these issues ante-mortem than can be discerned postmortem in any event. Neither the FMIA nor the existing federal regulations prioritize gathering every possible bit of information over all other considerations, so there is no genuine reason to view §599f as significantly inconsistent with existing policy.

C. §599f Does Not Create a New Danger of Friction Between State and Federal Employees

The United States raises another red herring by suggesting that laws like §599f create a potential for conflict between state and federal officials. U.S.Br.34. This is not a significant independent issue. Section 599f does not impose any obligations on federal officers; it

applies to slaughterhouses. A federal official could potentially come into conflict with state officials only if he or she was urging or facilitating a violation of valid state law. Federal officials know they are not supposed to do that. Surely the government is not suggesting that this Court hold state law to be preempted solely because complying with a valid state law would be inconvenient for federal personnel.

The United States concedes that state anticruelty laws are not preempted to the extent that they substantively duplicate (as most would) the federal regulations requiring humane treatment of animals. U.S.Br.26. If a federal inspector treated an animal inhumanely, or aided, abetted, or concealed a slaughterhouse's mistreatment, he or she would be subject to investigation and prosecution like any other citizen. Indeed, §599f actually *reduces* the possibility of conflict between state and federal officials by removing a class of animals that is particularly susceptible to inhumane treatment from the slaughter process, and the responsibility and jurisdiction of federal officials.

CONCLUSION

For the reasons set forth above, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

KAMALA D. HARRIS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RULE 29.6 STATEMENT

As noted in Petitioner's Brief on the Merits, the National Meat Association is an association, not a nongovernmental corporation, and is not required to file a Corporate Disclosure Statement pursuant to Sup. Ct. R. 29.6.

INDEX TO ABBREVIATIONS

The Brief for the State Respondents Kamala D. Harris, in her official capacity as Attorney General of California; Edmund G. Brown, Jr., in his official capacity as Governor of California; and the State of California is referred to as the State's brief ("State").

The Brief for the Non-State Respondents The Humane Society of the United States; Farm Sanctuary, Inc.; Humane Farming Association; and Animal Legal Defense Fund is referred to by name of the first Non-State Respondent, The Humane Society of the United States' brief ("HSUS").

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ARGUMENT

Although Respondents concede that California Penal Code § 599f imposes "requirements" upon federally-inspected slaughterhouses that are both "different than" and "in addition to" the provisions of the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601 *et seq.*, they claim that § 599f escapes the FMIA's express preemption clause because it is, in part, an "anticruelty law" that is outside the scope of the FMIA and is not imposed "with respect to . . . operations." But that is nonsense. The FMIA expressly and comprehensively regulates whether and how animals presenting the symptom of fatigue or possible disease with which § 599f is concerned – non-ambulation – may become human food, as well as how such animals are to be humanely handled. In fact, the Humane Methods of Slaughter Act of 1978 expressly amended the FMIA to incorporate the humane handling provisions set forth in the 1958 Act, which are now codified in FMIA §§ 603(b) and 610(b). Those sections, along with the animal inspection and food quality provisions set forth in 21 U.S.C. § 603(a), are unquestionably "within the scope" of the FMIA. And, as the FMIA and its implementing regulations and directives make clear, those provisions govern a federally-inspected slaughterhouse's "operations" from the moment an animal arrives on the slaughterhouse premises.

It does not matter that, as the State repeatedly argues, the FMIA does not *require* the slaughter of nonambulatory animals. That implied conflict

preemption argument has no place in this express preemption case. Section 599f prohibits what the FMIA indisputably *allows* – the slaughter and sale of nonambulatory animals (which have passed rigorous inspection). The State's law is "different than" and "in addition to" the FMIA and is, therefore, preempted.

Logically and correctly, the FMIA and its implementing regulations assume that all animals brought to a federally-inspected slaughterhouse are intended to be "offered for slaughter" and will thus be handled "in connection with slaughter." Those phrases do not, as HSUS argues, limit federal authority until animals have crossed some imaginary line on the slaughterhouse's premises. And, contrary to Respondents' assertions, § 599f does not "exempt" a "category of animals" (like "horses, dogs, and cats") from eligibility for slaughter. Rather, it attempts to regulate how an individual animal – of a "type" or a "species" or a "kind" otherwise acceptable for slaughter – will be handled and inspected based on a symptom (whether of fatigue or disease) that it exhibits on slaughterhouse premises. How such animals shall be handled and inspected, and their suitability to become food, are determinations that Congress expressly intended would be made exclusively by federal inspectors on slaughterhouse premises.

Receipt and purchase, humane handling, inspection, slaughter, processing, determinations of wholesomeness, and sale are all part of the "operations" of a slaughterhouse, and are all expressly within the scope of the FMIA. Because § 599f imposes

"requirements" that are "in addition to" and "different than" the FMIA, the California law is expressly preempted.

I. THE FMIA EXPRESSLY PREEMPTS CALIFORNIA PENAL CODE § 599f AS APPLIED TO FEDERALLY-INSPECTED SWINE SLAUGHTERHOUSES.

The challenged provisions of § 599f are preempted because they impose [1] "requirements" [2] "within the scope of [the FMIA]" [3] "with respect to premises, facilities and operations" of federally-inspected slaughterhouses that are [4] "in addition to, or different than" requirements imposed under the FMIA. 21 U.S.C. § 678. Respondents do not dispute that § 599f's subdivisions (a) through (c) impose "requirements" on federally-inspected slaughterhouses, or that those requirements are "in addition to, or different than" the requirements prescribed by Congress or the Secretary.[1]

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[1] Respondents do repeatedly characterize § 599f as "consistent with" or "complementary to" federal law because, for example, federal law does not *require* all nonambulatory hogs to be passed for slaughter and human consumption. *See, e.g.*, State Br. at 15, 19 n.8, 24; HSUS Br. at 54. Such a non-impossibility argument, however, pertains to *implied* conflict preemption; it has no place in this *express* preemption case. Where, as here, Congress has specified the test to be met – whether state law is "in addition to, or different than" federal rules and regulations – the question is whether the State law satisfies that explicit test. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 321-22 (2008).

(Continued on following page)

Instead, to avoid express preemption, Respondents attempt to confine the FMIA's "scope" solely to "requirements aimed at ensuring the safety of meat for human consumption," HSUS Br. at 34, and to limit the meaning of "operations" to "only encompass those activities related to the processing of meat," State Br. at 15.[2] *See also* HSUS Br. at 34. As shown below, those attempts clearly fail.

HSUS also seizes on the terms "offered for slaughter" (used in 9 C.F.R. § 309.1(a)) and "in connection with slaughter" (used in 21 U.S.C. § 603(b)) as if they implied that two kinds of hogs might come

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Indeed, the very inclusion of an express preemption provision means that Congress did not intend a drawn-out, fact-intensive, implied preemption analysis be undertaken for each "different" or "additional" but supposedly "complementary" or "consistent" requirement that a State may seek to impose on a federally-inspected slaughterhouse's operations.

Although NMA has not pressed an implied preemption claim before this Court at this time, it has not, as the State suggests, "waive[d] any implied preemption argument." State Br. at 14 n.4. Rather, NMA elected to focus the Court on the express preemption Congress intended and this Court confirmed in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), and, as a result, sought this Court's interlocutory review only of the Ninth Circuit's express preemption ruling.

[2] Respondents themselves are not consistent in their arguments. HSUS characterizes § 599f as a law aimed solely at animal cruelty and humane handling, contending it has nothing to do with food safety or human health and therefore lies outside the FMIA's scope. HSUS Br. at 14-19. The State, on the other hand, admits that a primary purpose of § 599f was "better protect[ing] human health." State Br. at 6. The FMIA, as shown, governs both, and preempts § 599f on either basis.

to a federally-inspected swine slaughterhouse: those to be slaughtered and others. HSUS Br. at 35, 41. But *all* hogs arriving at a federally-inspected swine slaughterhouse are there to be slaughtered, and for their meat to be processed for human consumption; there is no other reason to send them there.[3] The plain text of the FMIA shows that Congress recognized this, requiring, for example, the "examination and inspection" of "all" hogs even "*before* they are allowed to enter into any slaughtering . . . establishment." 21 U.S.C. § 603(a) (emphasis added).[4] To be sure, they must pass that initial – and all subsequent – inspections in order to continue to be qualified for slaughter to become human food, and federal inspectors, applying federal law, decide both if they remain qualified and what to do with them if they do not. And the regulations clearly take federal charge over the humane handling of all hogs from the moment they arrive at the slaughterhouse. *See, e.g.*, Pet. Br. at 7-10.[5]

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[3] Indeed, the FMIA expressly prohibits federal inspection under subchapter I at any slaughter establishment where the slaughter of amenable species is "not intended for use as human food." 21 U.S.C. § 641.

[4] Similarly, the rules and directives promulgated under the FMIA logically and correctly presume that all animals on slaughterhouse premises – from the moment they arrive – are there "in connection with slaughter" and are to be "offered for slaughter." *See* Pet. Br. at 7-10.

[5] Under HSUS's view, the Secretary has no authority to regulate the inspection or handling of hogs on federally-inspected slaughterhouse grounds unless and until those hogs

(Continued on following page)

A. The "Scope" of the FMIA Encompasses Both Animal Inspection and the Humane Handling of Livestock from the Moment the Animal Arrives at the Federally-Inspected Slaughterhouse.

1. The FMIA's Inspection Regime Begins Upon Arrival.

The FMIA expressly subjects *all* livestock entering slaughterhouse premises to ante-mortem inspection, 21 U.S.C. § 603(a), and sets forth the manner in which hogs found to be nonambulatory upon their initial inspection are to be handled and re-inspected. In the statute, Congress made clear that "all amenable species" on federally-inspected slaughterhouse premises must be "examin[ed] and inspect[ed]" by federal inspectors for "the purpose of preventing the use in commerce of meat and meat food products which are adulterated." 21 U.S.C. § 603(a); *see also* 9 C.F.R.

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cross an imaginary line – apparently somewhere on the slaughterhouse premises but beyond the gate – when they are "offered for slaughter" or handled "in connection with slaughter." That view – that federal authority suddenly appears (and, for some hogs, disappears again if they become nonambulatory later) as an individual hog progresses through the slaughterhouse premises – would subject slaughterhouse employees and federal inspectors to the risk of criminal sanctions (including imprisonment for up to one year) under state law if they happened to follow federal law on the wrong side of the line. But Congress did not leave this question to any doubt. It clearly intended federal law to govern from the moment animals arrive at the slaughterhouse, and both the FMIA and its implementing regulations and directives expressly say so.

§ 302.3 ("*All* livestock and all products *entering any official establishment* and all products prepared, in whole or in part therein, shall be inspected [and] handled . . . as required by the regulations in this subchapter.") (emphasis added); FSIS Directive 6900.2, Rev. 2, Ch. II, I. (Aug. 15, 2011) ("Once a vehicle carrying livestock enters, or is in line to enter, an official slaughter establishment's premises, that vehicle is considered to be a part of that establishment's premises. . . . If, for whatever reason, animals cannot be unloaded for ante-mortem inspection, I[nspection] P[rogram] P[ersonnel] will determine whether ante-mortem inspections can be safely and adequately conducted from outside the vehicle or, at the IPP's option, by entering the vehicle."); FSIS Directive 6100.1, Rev. 1, V. (Apr. 16, 2009). And Congress expressly instructed those federal inspectors on what to do with "amenable species" showing "symptoms of disease" on ante-mortem inspection: they "shall be set apart" and "slaughtered separately" from all other amenable species, and their carcasses "shall be subject to a careful examination and inspection," "all as prescribed by the rules and regulations to be prescribed by the Secretary[.]" 21 U.S.C. § 603(a).

Importantly, those rules and regulations specify how federal inspectors are to handle and inspect pigs found to be nonambulatory on federally-inspected slaughterhouse premises. Nonambulatory hogs are to be separated, taken to a covered pen, and held for further inspection or treatment, *see, e.g.*, 9 C.F.R.

§§ 313.2(d)(1), 313.1(c). Upon re-inspection, federal inspectors are required to classify the nonambulatory animals as "U.S. Suspects" or "U.S. Condemned." 9 C.F.R. §§ 309.2(b), 309.3. Nonambulatory hogs classified as "U.S. Suspects" and found to be safe to enter the food supply by a federal inspector may be passed for slaughter and sold for human consumption. 9 C.F.R. § 311.1(a); 21 U.S.C. § 610. Hogs classified as "U.S. Condemned" must be humanely euthanized and removed from the food supply. 9 C.F.R. § 309.13(a); 9 C.F.R. part 313.

Respondents do not dispute that swine are a type of "amenable species" subject to ante-mortem inspection, but they do try to characterize nonambulatory hogs as a "readily identifiable" "category" or "kind" of animal, akin to horses, dogs, or cats. *See, e.g.*, State Br. at 19, 23; HSUS Br. at 35, 37-40. Unlike a horse or dog or cat, however, nonambulation is a "symptom" of an often transitory condition or potential disease, not a "category of animal." *See* Pet. Br. at 58-60; *see also* HSUS Br. at 5 (noting nonambulatory pigs "suffer from a laundry list of physical and systemic problems."). Indeed, even the text of § 599f recognizes "nonambulation" as a symptom, not a "kind of animal." Section 599f(d) permits stockyards, auctions, market agencies, and dealers (but not slaughterhouses) either to take "immediate action to humanely euthanize" a nonambulatory pig, or to "provide immediate veterinary treatment." Cal. Penal Code § 599f(d). While a symptom (or, more accurately, the underlying disease or condition that is causing it)

may be treated, a "kind of animal" cannot. How animals presenting a "symptom of disease" (whether that symptom is nonambulation, 9 C.F.R. § 309.2(b), or, for example, having an elevated temperature, 9 C.F.R. § 309.3(c), or blisters, 9 C.F.R. §§ 309.2(j), 309.15) shall be handled and inspected, and their suitability to become food, are determinations that Congress stated would be made exclusively by federal inspectors. 21 U.S.C. § 603(a).

Moreover, and contrary to Respondents' facile assertions, *see, e.g.*, HSUS Br. at 35, the true status of a hog exhibiting the mutable symptom of nonambulation is not "readily identifiable" as is the status of being a horse, cat, or dog. The mere fact that a pig is lying down does not mean that it cannot or will not stand and walk without assistance if handled consistent with FMIA regulations. *See, e.g.*, Pet. Br. at 12 n.7 (citing FSIS Directive 6100.1, Rev. 1, VIII.B.2.b.) (detailing proper procedure for determining during ante-mortem inspection whether an animal is nonambulatory disabled, which includes humane handling to assist the animal to rise). And, as HSUS concedes, unlike a horse or dog or cat, the symptom of nonambulation may first arise on the premises of a federally-inspected slaughterhouse. HSUS Br. at 51-52. For those pigs that become nonambulatory in transit to the slaughterhouse, the symptom of nonambulation cannot be discovered until the truck arrives on slaughterhouse grounds, its doors are opened, and the pigs on the truck are inspected. *See* Pet. Br. at 46. The FMIA and its

regulations anticipate those facts and provide what to do, both in terms of humane treatment and further inspection.[6] *See* Pet. Br. at 9-10.

2. The FMIA Was Amended by the Humane Methods of Slaughter Act of 1978 for the Express Purpose of Imposing Humane Handling Requirements on Federally-Inspected Slaughterhouses From the Moment Animals Arrive at the Slaughterhouse.

Although HSUS admits that the FMIA "embraces certain humane treatment objectives," HSUS Br. at 40, it again attempts to limit their scope. According to HSUS (but not the State), the FMIA's humane handling requirements, codified (in part) in 21 U.S.C. §§ 603(b) and 610(b), are not really part of the "scope" of the FMIA because: (1) they cross-reference an "entirely distinct 'Act'," the Humane Methods of Slaughter Act of 1958 ("1958 HMSA"), which is codified in a separate part of the U.S. Code (7 U.S.C. §§ 1901-1906), HSUS Br. at 41; and, (2) there is, supposedly, "zero indication" in the legislative history

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[6] This further differentiates nonambulatory hogs at swine slaughterhouses from horses, dogs, and cats. Federal regulations do not purport to govern what federal inspectors are to do upon discovering that a stray horse or dog or cat has somehow arrived on swine slaughterhouse premises precisely because – unlike nonambulation – those "categories of animals" are not a "symptom."

that Congress intended to preempt state humane handling laws other than those involving the "humane treatment of animals that were destined to be turned into meat," *id.* at 42. This argument is both novel[7] and wrong.[8]

The Humane Methods of Slaughter Act of 1978 ("1978 HMSA") expressly amended the FMIA to require that the humane handling requirements of the 1958 Act (which had applied only to slaughterhouses selling meat to the federal government, *see* Pet. Br. at 5) be applied uniformly to all livestock on federally-inspected slaughterhouse grounds. Pub. L. No. 95-445, 92 Stat. 1069 (1978). Members of Congress recognized that "the time has come to apply humane standards *uniformly* throughout the [slaughterhouse] industry." House Agriculture Committee, 1978 HMSA, H.R.

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[7] HSUS has never made this argument before. Moreover, it contradicts HSUS's own admission at the petition stage that the FMIA "sets forth requirements that govern certain operations at federally-inspected slaughterhouses. 21 U.S.C. §§ 602-604." HSUS Br. in Opp. at 4. Section 603(b) is, of course, part of "21 U.S.C. §§ 602-604."

[8] Even the Ninth Circuit acknowledged that "the FMIA's humane handling requirements apply to all animals at the slaughterhouse." Pet. App. 15a. Accordingly, it concluded that § 599f(e), which it found "prohibits conduct – the dragging of unconscious downer animals – that federal law does not" was "thus a regulation of the 'operations' of an 'establishment at which [federal] inspection is provided' that's 'in addition to[ ] or different than' federal law and is therefore expressly preempted." *Id.* at 15a-16a. Neither the State nor HSUS have cross-petitioned or even taken issue with the Ninth Circuit's ruling on § 599f(e).

Rep. No. 95-1336, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2650, 2652 (emphasis added). To that end, Congress expressly stated the purpose of the 1978 HMSA was "[t]o *amend* the *Federal Meat Inspection Act* to *require* that meat inspected and approved under such Act be produced only from livestock slaughtered in accordance with humane methods. . . ." Pub. L. No. 95-445, Pmbl., 92 Stat. 1069 (1978) (emphasis added); *see also* 124 Cong. Rec. 24579 (1978) (stating 1978 HMSA would "amend[] the Federal Meat Inspection Act to extend the requirements of the Humane Slaughter Act of 1958 to cover all slaughtering under Federal and State inspection[.]") (statement of S. Dole). The 1978 HMSA then stated that "Section 3 of the Federal Meat Inspection Act (21 U.S.C. § 603) is amended by . . . adding at the end thereof a new subsection (b)" providing that:

> For the purpose of preventing the inhumane slaughtering of livestock, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of the method by which cattle, sheep, swine, goats, horses, mules, and other equines are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under this Act.

§ 2, 92 Stat. 1069 (codified at 21 U.S.C. § 603(b)). Section 10 of the FMIA (21 U.S.C. § 610) was also amended by the 1978 HMSA by inserting a new subsection "(b)" so as to prohibit any person, firm, or corporation from "slaughter[ing] or handl[ing] in

connection with slaughter any such animals in any manner not in accordance with the Act of August 27, 1958 (72 Stat. 862; 7 U.S.C. §§ 1901-1906)." § 3, 92 Stat. 1069 (codified at 21 U.S.C. § 610(b)). The phrase "in connection with slaughter" was used here to "ma[k]e clear that not only slaughter, but pre-slaughter handling of livestock, must be conducted humanely *from the time the animal arrives at the slaughter plant until the final stunning*." 124 Cong. Rec. 24580 (1978) (statement of S. Dole) (emphasis added); *see also* 44 Fed. Reg. 68811 (Nov. 30, 1979) ("It is the [U.S. Senate Committee on Agriculture, Nutrition, and Forestry's] intent that handling in connection with slaughter be interpreted by the Secretary to *begin at the time the livestock come into the custody of the slaughtering establishment, up to and including the moment of slaughter.*")[9] (citing S. Rep. No. 95-1059, at 4 (1978)) (emphasis added).

As this Court has made clear, when one statute amends a preceding statute, "th[o]se statutes are now to be read, as to all subsequent occurrences, as if they had originally been in the amended form." *United States v. La Franca*, 282 U.S. 568, 576 (1931). HSUS's attempt to infer ambiguity regarding the scope of the

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[9] This was made clear in response to concerns expressed by "representatives of humane groups . . . regarding at what point in the slaughtering process the provision for humane handling of livestock would become enforced and what the scope of the provision would be." Senate Committee on Agriculture, Nutrition, and Forestry, Humane Methods of Slaughter Act of 1978, S. Rep. No. 95-1059, at 4 (1978).

FMIA's express preemption provision from the fact that §§ 603(b) and 610(b) were added by later amendment is thus wrong.[10] Sections 603(b) and 610(b) are now clearly part of the FMIA's text, and the timing or manner in which they arrived has no bearing on whether the FMIA's express preemption provision applies. The FMIA's plain text controls.

Consistent with Congress' directive, the Secretary has prescribed myriad regulations regarding the humane handling of animals from the moment the animals arrive on slaughterhouse premises. *See, e.g.*, 9 C.F.R. § 302.3 ("*All livestock* and all products *entering any official establishment* . . . shall be inspected [and] *handled* . . . as required by the regulations in this subchapter.") (emphasis added); 9 C.F.R. § 313.1(a) ("Livestock pens, driveways and ramps shall be maintained in good repair. They shall be free from sharp or protruding objects which may, in the opinion of the inspector, cause injury or pain to the animals."); 9 C.F.R. § 313.2(a) ("Driving of livestock from the unloading ramps to the holding pens and from the holding pens to the stunning area shall be done with a minimum of excitement and discomfort to the animals."); 9 C.F.R. § 313.2(e) ("Animals shall have

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[10] Indeed, the Court has rejected this argument even in the context of a "clear statement inquiry" for Eleventh Amendment purposes: "The clear statement inquiry focuses on *what* Congress did enact, not *when* it did so. We will not infer ambiguity from the sequence in which a clear textual statement is added to a statute." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 76 (2000) (emphasis added).

access to water in all holding pens and, if held longer than 24 hours, access to feed."); *see also* FSIS Directive 6900.2, Rev. 2, Ch. II, I.[11] ("Once a vehicle carrying livestock enters, or is in line to enter, an official establishment's premises, the vehicle is considered to be a part of that establishment's premises. The animals within that vehicle are to be handled in accordance with 9 CFR 313.2.").[12]

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[11] FSIS Directive 6900.2, Rev. 2 was inadvertently mislabeled as 6000.2, Rev. 2 in Appendix D to Petitioner's Brief (App. 108).

[12] HSUS (but not the State) tries to belittle this FSIS Directive by noting the most recent version was promulgated "after review was granted in this case," and by calling it "arbitrary *ipse dixit*" that is "not entitled to deference." HSUS Br. at 36-37. Such name-calling often signals there is nothing behind the criticism, and that is the case here. As NMA's opening brief pointed out, this Directive is merely the latest iteration of a long-established and consistent agency position regarding the scope of its humane handling rules and when they begin to apply. *See, e.g.*, Pet. Br. at 7-9 n.2; *see also Barnhardt v. Walton*, 535 U.S. 212, 221 (2002) (rejecting request to disregard agency's interpretation of its regulations on the ground that the agency only recently enacted the regulations because the "Agency's interpretation is one of long standing.").

Moreover, the FSIS Directives merely follow from and implement both the statute and the regulations. Congress broadly ordered the Secretary to make sure "all . . . handling in connection with slaughter" be humane. 21 U.S.C. § 603(b). That handling starts, as Congress also ordered, with "an examination and inspection of all amenable species" even "before they shall be allowed to enter into any slaughtering . . . establishment." 21 U.S.C. § 603(a). The details of how to do that Congress expressly delegated to the Secretary of Agriculture, 21 U.S.C. §§ 602-604, and the Secretary, in turn, "delegated to the Administrator of

(Continued on following page)

Moreover, the mere fact that California claims to have made a "moral" judgment about a "category of animal" that it deems unsuitable for slaughter and human consumption does not mean, as Respondents advocate, that the State's judgment trumps Congress' different moral judgment. *See, e.g.*, 124 Cong. Rec. 24580 (stating "impetus" for enacting the 1978 HMSA included "[o]ur *national morality* and concern for other living creatures[.]") (statement of S. Dole) (emphasis added). As set forth above, the FMIA expressly covers how federal inspectors and slaughterhouse employees are to handle and inspect nonambulatory pigs on slaughterhouse grounds. Congress made the judgment that pigs found to be nonambulatory may nonetheless be purchased and received, and, upon receipt, separated, placed in a covered pen, and held for inspection by a federal inspector trained in veterinary medicine. If that inspection is passed, the

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the Food Safety and Inspection Service the responsibility for exercising the functions of the Secretary of Agriculture" under the FMIA and HMSA. 9 C.F.R. § 300.2(a); 7 C.F.R. §§ 2.18, 2.53. The Secretary's delegation of authority expressly "includes . . . the authority to . . . promulgate any rule, regulation, order, or instruction." 7 C.F.R. § 2.7. As this Court has long recognized, the "well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment as to which courts and litigants may properly resort for guidance," and "considerable weight should be accorded to an executive department's construction of a statutory scheme it was entrusted to administer." *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001) (quotations omitted); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding agency's reading of its own rule is entitled to substantial deference).

animals may be slaughtered, and the meat from those pigs may be processed and sold in commerce for human consumption. *Supra*, at 7-8. Congress made the further judgment that states were not entitled to make a different moral judgment, separate and apart from the one that Congress made, with respect to a federally-inspected slaughterhouse's "operations" within the Act's "scope." 21 U.S.C. § 678. Here, Congress made a judgment regarding what constitutes humane handling of nonambulatory animals, and whether those animals are suitable for slaughter and their meat for human consumption – all activities within the Act's "scope" and a slaughterhouse's "operations." The State's different judgment in this regard is expressly preempted on that basis as well.[13]

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[13] HSUS notes the former Secretary of Agriculture was supportive of "felony animal cruelty and misdemeanor counts of unlawfully moving a downed animal under former 599f(c)" filed against a pen manager involved in the Hallmark/Westland incident. HSUS Br. at 16. No doubt that was because the actions being prosecuted also violated federal law. *See, e.g.*, 9 C.F.R. § 313.2. HSUS fails to mention, moreover, that the former version of § 599f(c) is set forth in the current version of the statute as § 599f(e), a section that the Ninth Circuit held preempted and that is not at issue in this case.

B. A Slaughterhouse's "Operations" Are Covered From Receipt and Purchase through Sale.

HSUS concedes that the "operations" of a federally-inspected slaughterhouse are "best understood" as relating to the "constellation of regulatory subjects that the FMIA addresses and problems that it attempts to solve." HSUS Br. at 33. That concession is telling: as demonstrated above, the FMIA, as amended by the 1978 HMSA, was designed both to ensure the safety and wholesomeness of meat and the humane handling of animals on slaughterhouse grounds. As a result, at a minimum, a slaughterhouse's "operations" encompass the "practical work" associated with those objectives – namely, the initial purchase, receipt, and inspection, 21 U.S.C. § 603(a); humane handling, 21 U.S.C. §§ 603(b), 610(b); slaughter, 21 U.S.C. § 603(a); re-inspection and processing, 21 U.S.C. § 604; of nonambulatory hogs, and the sale of meat from those hogs for human consumption, 21 U.S.C. § 610(c). *See* Pet. Br. at 3-10, 44-51.

Respondents do not dispute that the inspection, slaughtering, and processing of animals are part of a slaughterhouse's "operations." For the reasons stated above, it cannot be seriously disputed that the receipt and humane handling of nonambulatory animals on slaughterhouse premises are part of a slaughterhouse's "operations" as well. Indeed, the FMIA expressly contemplates that such animals will be received and governs the manner in which those animals are to be handled and inspected upon receipt.

See Pet. Br. at 45-46. Moreover, the State does not dispute – and thus apparently concedes – that the purchase and sale of animals by a slaughterhouse are, as a practical matter, part of a slaughterhouse's "operations." *See* Pet. Br. at 46 n.18, 49-51. And HSUS does not dispute that, as a practical matter, the purchase of nonambulatory animals occurs simultaneously or co-extensively with receipt, *see* Pet. Br. at 46 n.18; HSUS Br. at 44, or that a slaughterhouse operates for the very purpose of turning the animals it has purchased into meat and selling the meat for human consumption. *See generally* The American College Dictionary (1964), at 1135 (defining "slaughterhouse" as "a building or place where animals are butchered for food"); Webster's Third New International Dictionary (1966), at 2139 (defining "slaughterhouse" as "an establishment where animals are butchered for market").

Respondents thus do not dispute the common sense fact that the sale of meat from the animals a slaughterhouse slaughters lies at the heart of a slaughterhouse's "operations." Federal law expressly permits a federally-inspected slaughterhouse to process and butcher the meat from nonambulatory animals, and sell that meat in commerce for human consumption, as long as the meat from those animals has been adjudged to be unadulterated by a federal inspector. *See* Pet. Br. at 49-51. Section 599f's provisions to the contrary are thus expressly preempted.

C. The FMIA's "Savings Clause" Does Not Save § 599f.

By limiting States' actions to "*other* matters" in the "savings clause" of § 678, Congress reinforced what States were *precluded* from doing – imposing requirements "in addition to, or different than" those "within the scope of this chapter with respect to premises, facilities and operations of any [federally-inspected] establishment." 21 U.S.C. § 678; *see also* Pet. Br. at 52-58.

That does not mean, however, that States have no room to act. The FMIA's express preemption provision makes clear that state regulation is preempted with respect to the "premises, facilities and operations of any establishment *at which inspection is provided under subchapter I of this chapter*," 21 U.S.C. § 678 (emphasis added), that is, any federally-inspected establishment where amenable species are inspected for use as human food. States may enact laws with respect to "other matters" within the Act's scope, such as, matters under subchapters II and III of the FMIA, as well as custom slaughterhouses and producers that are expressly exempted from regulation under subchapter I (*see* 21 U.S.C. § 623), so long as those laws are "consistent with" the FMIA and do not run afoul of Congress' express preemption provisions. 21 U.S.C. § 678.

II. THE RISKS TO HUMAN AND ANIMAL HEALTH ABSENT ANTE-MORTEM INSPECTION ARE REAL AND SUBSTANTIAL.

Section 599f(c)'s prohibition of ante-mortem inspection[14] is preempted because it is "different than" federal law, regardless of whether Respondents or their *amici* think such inspections of non-ambulatory pigs are important or not. Nonetheless, their attempts to downplay the health risks involved, *see* HSUS Br. at 54-58; State Br. at 26, are disturbingly misguided. HSUS's suggestion that ante-mortem inspection of nonambulatory pigs is unnecessary because only a "very small percentage" of pigs arrive nonambulatory and an "even smaller percentage"

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[14] Having ignored invitations to do so at every previous stage of these proceedings, the State for the first time attempts to reconcile § 599f(c)'s requirement of immediate euthanization with the FMIA's requirement of ante-mortem inspection by nebulously asserting the word "immediate" "need not necessarily be inconsistent with similar requirements of federal law." State Br. at 30. But this eleventh hour attempt is meaningless; the State makes no claim that such an interpretation (which it does not actually offer) would be binding, nor could it do so. In California, "the district attorney of each county independently exercises all the executive branch's discretionary powers in the initiation and conduct of criminal proceedings." *People v. Dehle*, 83 Cal. Rptr. 3d 461, 465 (Cal. Ct. App. 2008). *See also* Supp. Br. for Pet. at 12-13. And as the State itself points out, § 599f was supported by the California District Attorneys Association. State Br. at 7. The State's new position is also disingenuous because § 599f was specifically intended to be "in addition to, or different than" federal law. *See* Pet. Br. at 14-16 & n.9.

become nonambulatory on slaughterhouse premises, HSUS Br. at 58, ignores the reality that inspection procedures are used not only to address an individual animal presenting with that symptom, but to determine what kind of disease (if any) is at issue, such that preventative measures may be triggered with respect to other, still ambulatory pigs that may enter the food supply (e.g., quarantine of the entire lot). *See* Pet. Br. at 12-14. They also ignore that it only takes one diseased pig to start an outbreak, and that delay in detection can be devastating. *Id.*

HSUS's assertion that ante-mortem inspection is unnecessary because an FSIS "Question and Answer" under FSIS Directive 6100.1 indicates that slaughterhouse personnel may voluntarily remove from slaughter and humanely euthanize any animal, HSUS Br. at 55-56, is also misguided. As even HSUS admits, that "Question and Answer" involves non-ambulatory *cattle*, not pigs. *See* HSUS Br. at 55-56; *see also* FSIS Directive 6100.1, Rev. 1, VIII.A.6.b. ("Alternatively, the establishment may elect to condemn and humanely destroy the non-ambulatory disabled *cattle* before the PHV inspects and makes a disposition.") (emphasis added). As even HSUS admits, there is no similar authorization to voluntarily withdraw nonambulatory pigs from ante-mortem inspection, *see* HSUS Br. at 56; the regulations and directives recognize that different species require different treatment. *See* Pet. Br. at 10 n.6. And even if federal law *permitted* voluntary withdrawal of non-ambulatory pigs, § 599f *mandates* their withdrawal

from ante-mortem inspection, making it a requirement that is "in addition to, or different than" the federal rule and, therefore, preempted.

Finally, the significance of a foot and mouth disease ("FMD") or other outbreak with respect to animal or human health absent ante-mortem inspection cannot be overstated. Indeed, even Respondents' *amici* do not dispute the fact that FMD could have devastating effects on the meat industry and result in a horrible death for millions of animals. *See* Pet. Br. at 12-14; Br. of *Amici Curiae* T. Blackwell, D.V.M. and K. Mozzachio, D.V.M. at 5-8.

III. BECAUSE CONGRESS HAS ACTED PURPOSEFULLY AND EXPLICITLY, NO PRESUMPTION *AGAINST* PREEMPTION APPLIES.

In the end, Respondents' attempt to avoid the express preemption of § 678 by giving a "restrictive meaning" to the FMIA's scope and to the slaughterhouse operations it governs does no more than "twist[ ] the language beyond the breaking point." *Rath Packing*, 430 U.S. at 532. And as in *Rath Packing*, the FMIA's express preemption provision "dictates the result in th[is] controversy." *Id.* at 530-31. Because "the state law's requirement[s] . . . [are] 'different than' the federal requirement[s], . . . [the

state law provisions] are preempted by federal law." *Id.* at 531-32.[15]

That conclusion is also dictated by this Court's preemption jurisprudence. Whatever role a general "presumption against preemption" may play with respect to other statutes, its purpose is only to "assur[e] that 'the federal-state balance' will not be disturbed *unintentionally* by Congress or *unnecessarily* by the courts." *Id.* at 525 (citation omitted) (emphasis added). Here, Congress entered the field explicitly because it found the states' powers inadequate to accomplish the National interest, and it has continued to regulate this field for over a century; indeed, it has steadily and purposefully increased its regulation over that time. *See* Pet. Br. at 2-6. Moreover, by the text it chose for the FMIA's preemption provision, Congress expressly prohibited any State law "different than" or "in addition to" federal requirements; and by listing therein the only exceptions it intended to permit, it made clear it did not intend to permit others. *Id.* at 26-39. It then underscored its preemptive intent by expressly providing that different or additional state regulation is only permissible for "other matters" not already preempted. *Id.*

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[15] Respondents offer no meaningful response to *Rath Packing*. They each mention it once, but make no attempt to reconcile its interpretation of the FMIA's express preemption provision with their positions in this case. *See* State Br. at 19 n.8; HSUS Br. at 2.

When Congress is that clear that "its enactments alone are to regulate a part of commerce, state law regulating that aspect of commerce must fall." *Rath Packing*, 430 U.S. at 525. That is the result which should obtain here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

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NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

KAMALA D. HARRIS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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RULE 29.6 STATEMENT

As noted in the petition, NMA is an association, not a nongovernmental corporation, and is not required to file a Corporate Disclosure Statement pursuant to Sup. Ct. R. 29.6.

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RESPONSE TO BRIEF OF UNITED STATES

As the United States both demonstrates and agrees, the Federal Meat Inspection Act expressly preempts Section 599f, and the Ninth Circuit clearly erred in holding otherwise. But even though the United States concludes that "this Court could productively review the case at this stage," US Br. 20, the final two paragraphs of its 24-page brief say that the case does not fit the "traditional criteria warranting certiorari," *id.* 22, and suggest that a denial of certiorari "may leave open the possibility that the concerns discussed above could be addressed through the application of conflict preemption principles," *id.* 23. With respect, that analysis is not only incorrect (as we detail below), it ignores the very reason why the FMIA and its express preemption clause were enacted.

Congress passed the FMIA to *prevent* adulterated food and contagious animal diseases from wreaking health and economic havoc *ex ante*, not to fix "widespread economic harm and disruption of the meat supply," US Br. 20-21, *after* it happens. It included an express preemption clause in the FMIA so there would not have to be a drawn-out conflict-based preemption analysis. And where, despite that clearly expressed Congressional intent, a state nonetheless attempts to regulate animal handling and inspection in a way that is "different than" federal law (rather than working through the federal system, in the ways the United States explains it could, US Br. 17), the only way to stop that interference is by means of a preliminary injunction enforcing the federal law. The

will of Congress will be thwarted – and all of the human and animal health and economic ills that Congress sought to avoid come into play – if this Court were to decide not to take this case because it is "interlocutory."

Unlike speculation about what the State "might" do to ameliorate the conflict (which, the United States notes, even if done "could not save Section 599f from express preemption," US Br. 22), the health and economic threat posed by non-inspection of non-ambulatory swine is documented and very real. As the United States agrees, FMIA regulations are critical to the early detection of vesicular diseases such as foot and mouth disease, which has devastated livestock in the United Kingdom (in 2001)[1] and South Korea (currently).[2] Almost 3,000,000 swine a year are slaughtered in California; they arrive there – are "received" from – virtually every Western state, and it only takes one uninspected sick pig to start an epidemic. The federal system of ante-mortem inspection has thus far worked to prevent the outbreak of such disease in the United States, but for the first time

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[1] http://footandmouth.csl.gov.uk/.

[2] Foreign Agricultural Service, USDA, *Int'l Agricultural Trade Report* (Feb. 9, 2011), http://www.fas.usda.gov/info/WebStories/Formatted%20IATR%20South%20Korea%20FMD%202011.pdf; Evan Ramstad & Jaeyeon Woo, *Foot and Mouth Disease Roils Korean Farms*, Wall Street Journal, Jan. 11, 2011, http://online.wsj.com/article/SB10001424052748703791904576075341212752096.html.

since passage of the FMIA that safety net will disappear if the current injunction is vacated.

There is, moreover, good reason for the Court to credit the concerns voiced by Petitioner and echoed by its amici (all of which are acknowledged by the United States): NMA members' employees and the members of the American Association of Swine Veterinarians are, under the FMIA's system, the "first line" when it comes to the inspection and handling of livestock at a federally-inspected facility; they know firsthand the importance of what they do and what can happen if they don't do it. They are also, as the United States acknowledges, the people who will be "caught in the middle" between the requirements of federal law and the very different provisions of state law. *See* US Br. 22. It is NMA member employees and the swine veterinarians who will be subject to a $20,000 fine and a year in prison if they allow antemortem inspection of nonambulatory animals. Those penalties make the California law virtually self-enforcing. But that is exactly backwards: Congress has expressly stated that, as a matter of federal law, these handlers and inspectors are not to be put "at loggerheads" with different state laws; they are to follow the federal regulations. Failure to review and reverse the Ninth Circuit's decision now will not just directly undercut the safety and health concerns behind the FMIA's inspection and handling provisions; it will negate the very purpose of the express preemption clause.

I. CONGRESS INTENDED FMIA PREEMPTION TO PREVENT STATE LAWS FROM TAKING EFFECT

By including an express preemption provision in the FMIA, Congress intended state laws regarding handling and inspection to be nullified *before* they took effect and created problems. It passed the FMIA to detect animal diseases before they became epidemics and to prevent adulterated food from ever entering the nation's food supply, *see* 21 U.S.C. § 602, not to "wait and see" whether harm arises and fix the problems after they occur. Congress thus made clear it did not want to leave the question of preemption, as the United States suggests "may" be "possib[le]," to the uncertain "application of conflict-preemption principles." *See* US Br. 23. Rather, Congress intended for preempted state laws to be invalidated *before* an actual problem arose, whether that be the spread of disease through livestock populations and the attendant human health concerns, *id.* 20-21, "widespread economic harm and disruption of the meat supply," *id.*, or "state officials and FSIS inspectors at loggerheads over basic matters of slaughterhouse operations," *id.* 21.

The Ninth Circuit's stay of its mandate has temporarily preserved the preliminary injunction order and the status quo of federal law that the Ninth Circuit vacated, but only pending this certiorari petition. If the Court denies review now, the California law will go into effect, and all of the threats to public health and welfare – threats that the United

States admits could "destabilize the Nation's meat supply by devastating livestock populations," US Br. 10 – will be unleashed, for the first time. Such potentially devastating consequences cannot be reconciled with Congress' intent, especially where, as here, the United States agrees that the issue of express preemption is ripe for review at this stage, *id.* 20, and further development of the record below on this purely legal issue would not change the parties' positions or the Ninth Circuit's ruling against express preemption.

II. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE

Despite acknowledging real and potentially devastating public health concerns if Section 599f is not invalidated, *see* US Br. 20-21, the United States says the Ninth Circuit's decision "presently affects only California, where a relatively small fraction of the Nation's slaughtering takes place." *Id.* 22. That statement, however, ignores the fact that, as the United States admits elsewhere in its brief, the federally-inspected hog slaughterhouses located in California are engaged in substantial interstate commerce – both with respect to the receipt of swine from other states and the shipment of meat and meat products to other states. *Id.* 16. At just one federally-inspected hog slaughterhouse in California, for example, hogs are received from Arizona, Colorado, Nebraska, Texas, and Utah. C.A. App. 885 (Terrill Decl. ¶ 4). Under Section 599f, however, a nonambulatory

pig with a communicable disease transported to California from, say, Colorado, cannot be "received" and must instead be turned away to some other location, despite the animal's suffering and the potential to spread disease along the way.

Similarly, the United States recognizes that ante-mortem inspection is important because certain serious and highly contagious diseases are only detectable while the animal is alive. *See* US Br. 21 n.6; *see also* American Ass'n of Swine Vets. Amicus Br. ("Swine Vets Br.") 7-10. Detection of such diseases in a nonambulatory pig may mean that the *entire herd of origin* is affected, and alerts an inspector to test for that disease in other, apparently healthy and ambulatory pigs not yet manifesting symptoms which would otherwise be slaughtered for human consumption. *See* Pet. 13, 31-33; Swine Vets. Br. 4-6. It also triggers notice to animal health officials at USDA's Animal and Plant Health Inspection Service to investigate and, if appropriate, establish a quarantine. *See* FSIS Directive 6000.1 (rev. 1, Aug. 3, 2006). If Section 599f goes into effect, however, federal inspectors can no longer "hold" an animal for ante-mortem inspection and must instead, under threat of criminal penalties, "take immediate action to . . . euthanize the animal." Cal. Penal Code § 599f(c). As a result, disease will go undetected, no quarantine will be established, and the potentially infected animals not yet manifesting symptoms will be processed, packaged for sale, and distributed not just to consumers in California, but across the Nation. This is, of course,

directly contrary to the very purpose of the FMIA: to prevent adulterated food from entering the Nation's food supply.

The United States has acknowledged these real and substantial public health concerns. *See* US Br. 20-21. So too have the veterinarians – those who actually conduct inspections under the federal regime and thus are closest to the issue. *See* Swine Vets. Br. 4-10. The veterinarians unequivocally stated that Section 599f "threatens the public health by preventing ante-mortem inspection of 'downer' swine," "places the health of both swine and humans at unnecessary risk," and significantly interferes with the veterinarians' ability to do their job. *Id.* 10-11.

Importantly, the veterinarians' concerns were raised by a *national* association, with members throughout the country – the very people charged with and relied upon by USDA and FSIS to implement the FMIA at federally-inspected slaughterhouses. Given their knowledge and expertise, and their proximity to the issues at the heart of this case, the veterinarians' concerns should be credited by this Court. *See* US Br. 21 n.6 (relying on same).

Moreover, although the percentage of hogs slaughtered in California may appear "relatively small" when viewed as a percentage of the Nation's total (approximating 2% to 2.5% of the total), that percentage translates to almost 3,000,000 hogs slaughtered

on an annual basis,[3] of which it only takes *one* nonambulatory hog carrying an undetected communicable disease to pose a grave risk to animal health and the Nation's meat supply. This is particularly significant given that, at just one California slaughterhouse, approximately 225 hogs become nonambulatory and must pass federal ante-mortem inspection *each day*. CA App. 886 (Terrill Decl. ¶ 12).

III. THE NINTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *RATH PACKING* AND APPLIES THE PRESUMPTION AGAINST PREEMPTION INCONSISTENTLY WITH OTHER CIRCUITS

The Ninth Circuit's decision also presents a conflict that squarely "implicate[s] a division of appellate authority" and meets "traditional criteria warranting certiorari" under Rule 10. *Cf.* US Br. 11, 22. The Ninth Circuit has decided the express preemption issue "in a way that conflicts with [a] relevant decision[ ] of *this Court*," and that is a compelling ground for review. Sup. Ct. R. 10(c) (emphasis added).

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[3] *See* Nat'l Agric. Stats. Serv., USDA, *California Livestock Review* (Apr. 29, 2011), http://www.nass.usda.gov/Statistics_by_State/California/Publications/Livestock/201104lvsrv.pdf (2,708,000 annualized total commercial hogs slaughtered in California based on March 2011 data); *see also* CA App. 869 (Meat & Poultry Facts 2008 (2,570,300 hogs slaughtered for commercial purposes in California during 2007)).

In *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), this Court interpreted identical, parallel language in the same express preemption provision at issue here – 21 U.S.C. § 678 of the FMIA – and held that "explicitly stated in the statute's language" was Congress' "unmistakably . . . ordained" intent that Section 678 be given a "broad meaning." *Id.* at 525, 540. As a result, this Court held that "th[e] explicit pre-emption provision dictates the result in th[is] controversy;" because the state's requirement "is 'different than' the federal requirement," the state law provisions "are pre-empted by federal law." *Id.* at 530-32. That same preemption language should also have dictated the result here, but instead the Ninth Circuit held just the opposite, giving "this provision a *narrow* interpretation," and holding that "[t]here is no express preemption here." Pet. App. 8a, 11a (emphasis added). Such a failure to follow one of this Court's decisions is, of course, one of the "traditional" grounds for granting review. "Where the decision of the court of appeals clearly fails to apply prior Supreme Court decisions because of error or oversight, the Court usually grants certiorari." E. Gressman, et al., *Supreme Court Practice*, at 250 (9th ed. 2007); *see, e.g., Lambert v. Wichlund*, 520 U.S. 292, 293 (1997) (certiorari granted "[b]ecause the Ninth Circuit's holding is in direct conflict with our precedents").[4]

---

[4] Similarly,

> where . . . there is some important and clear-cut issue of law that is fundamental to the further conduct of

(Continued on following page)

Moreover, although the United States properly highlights the "misguided" and "misconceived" nature of the Ninth Circuit's opinion, US Br. 10, 20, it fails to note *what led* the Ninth Circuit to misinterpret the FMIA's preemptive scope so egregiously: an improper invocation of the presumption against preemption. That presumption was central to the Ninth Circuit's decision, and it said so: "Consistent with the presumption against preemption, we must give this provision a narrow interpretation." Pet. App. 8a. That presumption drove the Ninth Circuit to "twist[ ] the language [of Section 678] beyond the breaking point" (even though such manipulation of Section 678 was expressly forbidden by *Rath Packing*, 430 U.S. at 532) to try to show Section 599f did not impose different requirements for animal handling and inspection. *Cf.* US Br. 11-20 (detailing the ways "Section 599f would dictate how federally regulated slaughterhouses must conduct operations involving nonambulatory animals," which the Ninth Circuit's "reason[ing] . . . ignore[s]").

> the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status – particularly if the lower court's decision is patently incorrect and the interlocutory decision, such as a preliminary injunction, will have immediate consequences for the petitioner.

E. Gressman, *supra*, at 281 (citing cases); *see, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (per curiam) (granting review where interlocutory Ninth Circuit "decision is clearly erroneous under our precedents" and "has created a real threat of [immediate] consequences"). *See also* Pet. 37.

The Ninth Circuit's invocation of and explicit reliance on the presumption against preemption puts it at one end of a myriad of conflicting opinions across the circuits as to the presumption's proper application. *See* Pet. 27-31. This confusion, grounded as the circuits have recognized in the "ongoing disagreement among Supreme Court jurists as to if, when, and how this presumption applies," Pet. 5-6 (quoting *Demahy v. Actavis, Inc.*, 593 F.3d 428, 434 (5th Cir. 2010), *cert. granted*, 131 S.Ct. 817 (Dec. 10, 2010) (No. 09-1501)), has not been clarified this Term.[5]

The Ninth Circuit's conflict with *Rath Packing* and explicit reliance upon the presumption against preemption pose important federal questions that fall squarely within the Court's traditional criteria for granting certiorari and compel review here.

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[5] *Cf. Bruesewitz v. Wyeth LLC*, 131 S.Ct. 1068 (2011); *Chamber of Commerce v. Whiting*, No. 09-115, slip op. (May 26, 2011). The only mention of the presumption against preemption in those cases occurred in *Bruesewitz*, where it was invoked in a passing footnote by the two dissenting justices. *Bruesewitz*, 131 S.Ct. at 1094 n.15 (Sotomayor, J., dissenting). At this writing, *PLIVA, Inc. v. Mensing*, 588 F.3d 603 (8th Cir. 2009), *cert. granted*, 131 S.Ct. 817 (Dec. 10, 2010) (No. 09-993), with which Nos. 09-1039 and 09-1501 have been consolidated, has not yet been decided.

IV. NEITHER THE STATE NOR THE LOWER COURTS CAN AMELIORATE THE EXPRESS PREEMPTION CONCERNS

Finally, delayed review will not result in an "amelioration" here. First and most importantly, as the United States correctly notes, neither the exercise of "suitable discretion" nor a narrow interpretation of terms such as "nonambulatory" or "immediate" will "save Section 599f from express preemption." US Br. 22.

Second, the criminal penalties at issue here – a year's imprisonment and $20,000 fine – essentially make California's law self-enforcing. As the United States recognizes, slaughterhouse operators and employees are likely to "submit to the California law" given the threat of criminal penalties, and "FSIS inspectors themselves could in principle be criminally charged." *Id.* 22. Such realities "will force the official to change his conduct." *Camreta v. Greene*, No. 09-1454, slip op. at 7 n.4 (May 26, 2011). Nor is there any reason to think prosecutors will restrain themselves in enforcing the law. The amendment to Section 599f was proposed with formal support from the California District Attorneys Association, with one district attorney testifying to the state legislature that "Californians should demand that law enforcement be given the tools they need." C.A. App. 197, 247-48. In California, district attorneys have

independent prosecutorial authority,[6] so it is highly doubtful any "ameliorating" interpretation offered by the State would be binding, and no such interpretation has been offered in the more than two years since the amendment's effective date in any event. And as the United States has observed, while any such limitation "could not save Section 599f from express preemption," the State's "silence . . . amplifies the concern that Section 599f will intrude on the federal scheme if it goes into effect." US Br. 22.

As the United States has also recognized, further litigation before the district court without action by this Court will not lead even to a belated correction of the Ninth's Circuit's error. *Id.* 23 n.7. An unlikely ruling on other preemption grounds would not change its fundamental failing on express preemption, and in the meantime all of the consequences noted above will have come into play.[7] Accordingly, no possibility of amelioration lessens the imperative that the Court grant certiorari, and that it do so now.

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[6] "[T]he district attorney of each county independently exercises all the executive branch's discretionary powers in the initiation and conduct of criminal proceedings." *People v. Dehle*, 83 Cal. Rptr. 3d 461, 465 (Cal. Ct. App. 2008).

[7] Similarly, while a rulemaking petition by one respondent is currently pending, *see* Pet. 38 n.17, the United States rightly observes it "would not, if granted, moot this case," and preemption issues would continue to persist. US Br. 17.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 10-224

In the Supreme Court of the United States

NATIONAL MEAT ASSOCIATION, PETITIONER

v.

KAMALA D. HARRIS, ET AL.

ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.*, expressly preempts any state law that imposes "[r]equirements within the scope of [the Act] with respect to premises, facilities and operations" of any slaughterhouse inspected under the Act that are "in addition to, or different than" requirements under the Act. 21 U.S.C. 678. The question presented is whether 21 U.S.C. 678 preempts California Penal Code § 599f, which requires, *inter alia*, the immediate euthanasia of nonambulatory swine at slaughterhouses subject to the Act.

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INTEREST OF THE UNITED STATES

The Food Safety and Inspection Service (FSIS), an agency in the United States Department of Agriculture, has primary responsibility for enforcing the Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.* The United States has a strong interest in the correct interpretation of the Act's express preemption provision, 21 U.S.C. 678, which ensures that FSIS can discharge its duties at federally regulated slaughterhouses free from unwarranted intrusion by state law. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. For more than a century, federal law has regulated a broad range of activities at slaughterhouses to ensure the safety of meat and meat food products. See Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1260. That law has been amended several times and is now designated as the Federal Meat Inspection Act (FMIA), 21 U.S.C. 601 *et seq.* The FMIA regulates matters such as the humane handling and slaughter of cattle, sheep, swine, goats, and equines; the ante-mortem selection of animals suitable for slaughter for human food; the post-mortem inspection of carcasses; sanitary conditions for slaughtering and processing; the marking and labeling of meat and meat food products; and commerce in adulterated meat and meat food products. See 21 U.S.C. 603-604, 607-610.

a. Two components of the FMIA's regulatory framework are particularly relevant here. The first is its ante-mortem and post-mortem inspections. The Act directs the Secretary of Agriculture (USDA) to inspect animals "before they shall be allowed to enter into any slaughtering * * * establishment" and requires that those animals that "show symptoms of disease" be "set apart and slaughtered separately" from other animals. 21 U.S.C. 603(a). The FMIA further directs USDA to make "a post mortem examination and inspection of the [slaughtered animal] carcasses and parts thereof * * * to be prepared * * * as articles of commerce which are capable of use as human food." 21 U.S.C. 604. USDA is authorized to make "such rules and regulations as are necessary for the efficient execution of the provisions of [the FMIA]." 21 U.S.C. 621.

Second, in the Humane Methods of Slaughter Act of 1958 (HMSA), Pub. L. No. 85-765, 72 Stat. 862, Con-

gress established a federal policy regarding the humane handling and slaughter of livestock. The HMSA declares that "[n]o method of * * * handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane," and it authorizes USDA to "designate methods * * * of handling in connection with slaughter which, with respect to each species of livestock, conform to th[at] policy." HMSA §§ 2, 4(b), 72 Stat. 862-863 (7 U.S.C. 1902, 1904(b)).

As originally enacted, the HMSA applied only to "[federal] procurement and price support programs and operations." HMSA § 3, 72 Stat. 862. In 1978, Congress extended the HMSA to all federally inspected slaughterhouses by "amend[ing] the Federal Meat Inspection Act to require that meat inspected and approved under such Act be produced only from livestock slaughtered in accordance with humane methods." Humane Methods of Slaughter Act of 1978 (HMSA 1978), Pub. L. No. 95-445, 92 Stat. 1069. In particular, Congress amended the FMIA to require USDA to make "an examination and inspection of the method by which [livestock] are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under [the FMIA]," and to authorize USDA to refuse inspection at a slaughtering establishment if livestock "have been slaughtered or handled in connection with slaughter at such establishment by any method not in accordance with the [HMSA]." HMSA 1978 § 2, 92 Stat. 1069 (adding 21 U.S.C. 603(b)). Congress also directly required slaughterhouses to comply with the HMSA. HMSA 1978 § 3, 92 Stat. 1069 (amending 21 U.S.C. 610).

b. The Food Safety and Inspection Service is the public health agency in USDA responsible for ensuring

that the Nation's commercial supply of meat, poultry, and egg products is safe, wholesome, and correctly labeled and packaged. FSIS employs more than 8000 full-time inspectors, public health veterinarians, and other front-line personnel, who are responsible for approximately eight million food-safety and food-defense verification procedures annually. As relevant here, FSIS administers all aspects of the FMIA, including inspections and humane-handling requirements (see 9 C.F.R. 300.1 *et seq.*) at approximately 800 establishments in the United States that slaughter livestock. In fiscal year 2010, FSIS inspected about 147 million head of livestock and conducted more than 126,000 humane-handling verification procedures under the FMIA. See *2012 USDA Budget Explanatory Notes. Food Safety and Inspection Service* 21-4, 21g-3, 21g-4, http://www.obpa.usda.gov/21fsis2012notes.pdf (discussing scale of FSIS activities in connection with Fiscal Year 2012 budget request); FSIS Directive 6900.2 (rev. 2, Aug. 15, 2011) (Pet. Br. App. 108-137) (describing humane-handling verification procedures, documentation, and responses to noncompliance); FSIS Directive 6100.1 (rev. 1, Apr. 16, 2009) (Pet. Br. App. 44-84) (describing ante-mortem livestock inspection procedures).

FSIS regulations establish, *inter alia*, standards for the good repair of slaughterhouse facilities to avoid injury to livestock; practices for humanely driving animals within the establishment; and rules for the humane handling of diseased or disabled animals. See generally 9 C.F.R. 313.1-.2. FSIS regulations also establish a system of identifying certain animals as condemned and unsuitable for human food; identifying other animals as potentially unsuitable for human food (in whole or in part), subject to further examination; and passing other

animals for slaughter. See generally 9 C.F.R. Pts. 309-310.

Animals must be handled humanely at all times on the slaughterhouse premises. FSIS Directive 6100.1 (Part VIII.A.1) (Pet. Br. App. 47) ("All animals that are on the premises of the establishment, on vehicles that are on the premises, or animals being handled in connection with slaughter (e.g., livestock on trucks being staged for slaughter) are to be handled humanely."). To that end, FSIS regulates the means by which a slaughterhouse may drive or move animals. 9 C.F.R. 313.2(a)-(c). Of particular relevance here, those regulations cover both normal ambulatory animals and animals that refuse to move despite having no condition disabling them from moving (*i.e.*, nonambulatory but not disabled animals).

All livestock are "examined and inspected on the day of and before slaughter," 9 C.F.R. 309.1(a), by an FSIS inspector and, as needed, an FSIS veterinarian. Animals not suspected of being affected with any disease or condition that would prevent their use as human food are passed for slaughter. Animals showing symptoms of certain diseases or conditions are classified by an FSIS veterinarian as "U.S. Condemned." 9 C.F.R. 309.3-.9 and .15-.16; see 9 C.F.R. 301.2. Such animals may not be used as human food, and they must be killed apart from the slaughtering facilities where human food is produced. 9 C.F.R. 309.13. Their carcasses must be handled and disposed of so as not to adulterate products for human consumption. See 9 C.F.R. Pt. 314.

Animals found or suspected on ante-mortem inspection to be affected with certain other diseases or conditions are classified by an FSIS veterinarian as "U.S. Suspect." 9 C.F.R. 309.2(c)-(h) and (j)-(*l*); see 9 C.F.R.

301.2. In addition, "seriously crippled animals and non-ambulatory disabled livestock shall be identified as U.S. Suspects." 9 C.F.R. 309.2(b).[1] U.S. Suspects "shall be set apart and shall be slaughtered separately from other livestock." 9 C.F.R. 309.2(n); see FSIS Directive 6900.2, at 14-15 (Pet. Br. App. 125-127). As a matter of humane handling, U.S. Suspects (including nonambulatory disabled animals) must be kept in a covered pen with access to water (and if held more than 24 hours, feed), pending observation and disposition by an FSIS veterinarian. 9 C.F.R. 313.1(c); see 9 C.F.R. 313.2(d)-(e) (governing treatment of "animals unable to move").

For swine, the observation period and ante-mortem inspection allow FSIS to determine the nature of the animal's condition. At one extreme, swift action must be taken if the affected animal has a condition that signals disease spreading within the herd or that could reflect a threat to the larger swine population. For example, 9 C.F.R. 309.15 requires federal inspectors to notify local, state, and federal livestock sanitary officials "when any livestock is found to be affected with a vesicular disease," which includes the highly communicable and potentially economically devastating foot-and-mouth disease. At the other extreme, an animal initially designated as "U.S. Suspect" because of a treatable condition may sometimes be held for treatment, reinspected, and released for slaughter without the "U.S. Suspect" designation. See 9 C.F.R. 309.2(g) and (i)-(k).

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[1] Nonambulatory disabled full-grown cattle are subject to a different rule. Such animals are automatically condemned because the inability to walk is a symptom of bovine spongiform encephalopathy ("mad cow disease"). See 9 C.F.R. 309.3(e); 69 Fed. Reg. 1862 (2004); 72 Fed. Reg. 38,700 (2007); 74 Fed. Reg. 11,463 (2009).

The carcasses of animals ultimately classified as "U.S. Suspect" are disposed of as provided in 9 C.F.R. Part 311. Those regulations guide FSIS inspectors' discretion in determining upon post-mortem examination which parts, if any, of a suspect carcass may be salvaged as unaffected by the disease or condition that warranted the animal's identification as "U.S. Suspect"—and thus may be processed into meat and meat food products for human consumption.

After slaughter and post-mortem inspection, slaughterhouses and other establishments butcher and process carcasses into meat and meat food products. FSIS inspectors examine those products and the establishments in which they are prepared to determine if the products are "adulterated," a term embracing a range of conditions that make meat unsuitable for commerce or unsuitable for use as human food. See 21 U.S.C. 606(a) (Supp. II 2008) (requiring inspections); 21 U.S.C. 601(m) (defining "adulterated"); 9 C.F.R. Pt. 318 (implementing regulations).

c. As originally enacted, the FMIA regulated only slaughterhouses slaughtering livestock and preparing meat and meat food products for interstate or foreign commerce. See, *e.g.*, 21 U.S.C. 71 (1964) (providing only for inspections of livestock whose meat was "to be used in interstate or foreign commerce"). In 1967, however, Congress found that "[u]nwholesome, adulterated, or misbranded meat or meat food products"—whether or not in interstate or foreign commerce—"impair the effective regulation of meat and meat food products in interstate or foreign commerce" and "substantially affect such commerce" by "compet[ing] unfairly with the wholesome, not adulterated, and properly labeled and packaged articles." Wholesome Meat Act (WMA), Pub.

L. No. 90-201, § 2, 81 Stat. 587-588 (21 U.S.C. 602). Accordingly, to facilitate "regulation by [USDA] and cooperation by the States," § 2, 81 Stat. 588, the WMA amended the FMIA by marking the boundaries between federal and state slaughterhouse regulation in three ways that persist today.

First, the WMA reaffirmed that the FMIA always applies to the slaughtering of animals to produce meat for interstate and foreign commerce. See WMA § 2, 81 Stat. 584 (adding FMIA § 2(h), now codified at 21 U.S.C. 601(h), defining "commerce"). The WMA also reaffirmed that many of the FMIA's requirements do not apply to personal or custom slaughtering. WMA § 11, 81 Stat. 591 (amending FMIA § 23, now codified at 21 U.S.C. 623(a), specifying exemption).

Second, the WMA established a framework for regulation of intrastate slaughtering. Each State is presumptively responsible for developing and enforcing, at slaughterhouses producing meat solely for distribution within the State, "requirements at least equal to those imposed under [the FMIA]." WMA § 15, 81 Stat. 596 (adding FMIA § 301(c)(1), now codified at 21 U.S.C. 661(c)(1)). USDA is authorized "to cooperate with the appropriate State agency in developing and administering * * * a State meat inspection law." WMA § 15, 81 Stat. 595 (adding FMIA § 301(a)(1), now codified at 21 U.S.C. 661(a)(1)).[2]

If, however, a State does not develop and enforce such a law—as California and about half the States have

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[2] Congress recently authorized USDA to permit interstate shipments by certain small state-inspected establishments. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 11015(a), 122 Stat. 1362 (adding 21 U.S.C. 683); 76 Fed. Reg. 24,714 (2011) (FSIS final rule implementing same).

not—USDA "shall * * * designate such State as one in which the provisions of [the FMIA] shall apply to operations and transactions wholly within such State." WMA § 15, 81 Stat. 596 (adding FMIA § 301(c)(1), now codified at 21 U.S.C. 661(c)(1)); see 9 C.F.R. Pt. 331 (listing such States, including California). Thus, in States without state law "requirements at least equal to those imposed under [the FMIA]," 21 U.S.C. 661(c)(1), the WMA made slaughtering for intrastate, interstate, and foreign commerce uniformly subject to the FMIA's inspection regime.

Third, the WMA added the express preemption provision at issue in this case:

> Sec. 408. Requirements within the scope of this Act [*i.e.*, the FMIA] with respect to premises, facilities and operations of any establishment at which inspection is provided under * * * this Act, which are in addition to, or different than those made under this Act may not be imposed by any State.

§ 16, 81 Stat. 600 (adding FMIA § 408, now codified at 21 U.S.C. 678). That provision also includes a savings clause: "This Act shall not preclude any State * * * from making requirement[s] or taking other action, consistent with this Act, with respect to any other matters regulated under this Act." *Ibid.*

2. As originally enacted in 1994, California Penal Code § 599f prohibited certain actors from "buy[ing], sell[ing], or receiv[ing] a nonambulatory animal," Cal. Penal Code § 599f(a) (West 1995), or "hold[ing] a nonambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises," *id.* § 599f(b). Section 599f(a) by its terms did not apply to slaughterhouses "inspected by

[USDA]"; Section 599f(b) did not contain such a clause, and so apparently applied to all slaughterhouses, though USDA is unaware of any state prosecution in connection with a federally inspected slaughterhouse. A violation of either provision was punishable by a maximum of six months of imprisonment and/or a $1000 fine. *Id.* §§ 19, 599f(d) (West 1995).

Section 599f was amended in 2008. 2008 Cal. Legis. Serv. ch. 194 (West). The amendment extended Section 599f(a)'s existing bans to all slaughterhouses, including those that are federally inspected. Cal. Penal Code § 599f(a) (West 2010). It took away the option of removing a nonambulatory animal from the slaughterhouse premises, and thus required immediate euthanizing of any nonambulatory animal. *Id.* § 599f(c). It added a prohibition on "process[ing], butcher[ing], or sell[ing] meat or products of nonambulatory animals for human consumption." *Id.* § 599f(b). And it increased the maximum penalty for violating Section 599f to one year of imprisonment and a $20,000 fine. See *id.* § 599f(h).[3]

3. Petitioner is an association of meat packers and processors, including operators of swine slaughter-

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[3] The 2008 amendment preserved Section 599f(e)'s regulation of how slaughterhouses may move nonambulatory animals: "While in transit or on the premises of a * * * slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance." The court of appeals and the district court both held that petitioner was likely to succeed on the merits of its preemption challenge to Section 599f(e), but the court of appeals vacated the preliminary injunction and remanded for findings about irreparable injury and the balance of the equities with respect to Section 599f(e) in particular. Pet. App. 16a-17a. The parties do not specifically challenge either the court of appeals' determination that Section 599f(e) is likely preempted or its narrow remand order.

houses. Compl. ¶¶ 2-3, 7. Petitioner sued California officials, seeking to enjoin the enforcement of Section 599f against federally inspected swine slaughterhouses.

The district court granted petitioner's motion for a preliminary injunction. Pet. App. 18a-53a. As relevant here, the court concluded that 21 U.S.C. 678 expressly preempts Section 599f because the California law "alters the process and methods for the receipt of animals, the determination of the animal as 'disabled' or 'nonambulatory,'" and the rules regarding "handling of the nonambulatory animal." Pet. App. 36a-37a. The court explained that the FMIA and its implementing regulations "permit a slaughterhouse to set aside for further inspection an animal that is nonambulatory," but that Section 599f "expressly requires that the same animal be 'immediately' euthanized." *Id.* at 37a. The court therefore held that Section 599f "imposes inspection requirements upon federally inspected slaughterhouses which are in addition to or different than FMIA" and is expressly preempted by 21 U.S.C. 678. Pet. App. 37a.

The district court rejected respondents' argument that a nonambulatory animal is a "type of meat" that a State could choose to exclude from being introduced into the human food supply altogether, as it might with "horse meat or dog meat or rat meat." Pet. App. 38a-39a. "A pig is a pig. A pig that is laying down is a pig. * * * California permits pigs to be produced for human consumption," and "[h]aving allowed pigs and swine to enter the food supply, California cannot alter the federally mandated requirements of inspection." *Id.* at 39a.

The district court found that petitioner "is faced with an immediate threat of irreparable harm" from the conflict between Section 599f and the FMIA and from the threat of criminal penalties. Pet. App. 48a. The court

further found that the equities favored enjoining enforcement of Section 599f in light of the "interest of protecting the quality of the food supply and the quantity of meat processed for human consumption, and because adequate enacted law minimizes the potential risk." *Id.* at 52a.

4. The court of appeals vacated the preliminary injunction and remanded. Pet. App. 1a-17a. As relevant here, it concluded that 21 U.S.C. 678 does not expressly preempt Section 599f because, in the court's view, Section 599f does not address the "premises, facilities [or] operations" of slaughterhouses, but rather "regulates the kind of animal that may be slaughtered." Pet. App. 9a. The court reasoned that "the FMIA establishes inspection procedures to ensure animals that are slaughtered are safe for human consumption, but this doesn't preclude states from banning the slaughter of certain kinds of animals altogether." *Ibid.*

The court of appeals criticized the district court's analysis as limiting a State to "excluding animals from slaughter on a species-wide basis." Pet. App. 10a. It concluded instead that a State is free to "decide which animals may be turned into meat" based on "a host of practical, moral and public health judgments that go far beyond those made in the FMIA." *Ibid.* The court acknowledged that "a state may go too far in regulating what 'kind of animal' may be slaughtered," if it "effectively establish[es] a parallel state meat-inspection system" by "styl[ing] new [inspection] standards as a regulation of the 'kind of animal' that may be slaughtered." *Id.* at 10a-11a. But the court concluded that this case did not require it to "decide what limits the express preemption provision places on such regulations." *Id.* at 11a.

The court of appeals denied petitioner's petition for rehearing, Pet. App. 57a-59a, but stayed its mandate pending disposition of the certiorari petition, see *id.* 54a-56a; Fed. R. App. P. 41(d)(2)(B). Accordingly, the district court's preliminary injunction remains in force.

SUMMARY OF ARGUMENT

A. Petitioner challenges the provisions of Section 599f that forbid its members to "buy, sell, or receive a nonambulatory animal," Cal. Penal Code § 599f(a); to "process, butcher, or sell meat or products of nonambulatory animals for human consumption," *id.* § 599f(b); or to "hold a nonambulatory animal without taking immediate action to humanely euthanize the animal," *id.* § 599f(c). The FMIA expressly preempts those provisions.

1. The challenged provisions of Section 599f are preempted because they impose "requirements" that are "within the scope of [the FMIA]" and "with respect to" slaughterhouse "operations," but are "in addition to, or different than" requirements prescribed under the FMIA. 21 U.S.C. 678.

"*Requirements.*" The challenged provisions of Section 599f set forth "requirements" because they command a slaughterhouse to take certain actions and refrain from others in conducting its operations. Even the ban on selling meat from a nonambulatory animal is properly understood as a "requirement" because that sale ban enforces California's underlying dictate to slaughterhouses about how they must handle nonambulatory animals up to and during slaughter.

"*Within the scope of [the FMIA].*" The challenged provisions of Section 599f concern how animals are handled at a slaughterhouse when they are unloaded from

the delivery truck, held pending ante-mortem inspection, sent for slaughter, and ultimately butchered and processed into meat and meat food products. Those subjects are within the scope of USDA's authority under the FMIA and are addressed at length in USDA regulations and FSIS directives.

"*With respect to* * * * *operations*." The challenged provisions of Section 599f regulate slaughterhouse operations—*i.e.*, the actions done as part of the practical work performed at the slaughterhouse. Like the FMIA's humane-handling and inspection requirements, the California law addresses practical aspects of how slaughterhouses must handle animals in connection with slaughter, and the conditions under which processing of the carcasses into meat and meat food products must occur.

"*In addition to, or different than.*" Section 599f's requirements regarding nonambulatory swine are not the same as those under the FMIA. Federal regulations do not prohibit the receipt or holding of nonambulatory swine; to the contrary, they contemplate that such animals will be received and address how they will be humanely handled and held. Nor do USDA regulations flatly prohibit processing the meat of nonambulatory swine for sale; rather, there is a system of ante-mortem and post-mortem inspections designed to pass carcasses of nonambulatory swine for human consumption in whole or in part if appropriate.

2. The court of appeals thought the challenged provisions of Section 599f were not preempted because they regulate "the kind of animal that may be slaughtered." Pet. App. 9a. That reasoning is flawed. The court's "kind of animal" criterion has no basis in the text of 21 U.S.C. 678. Moreover, the court acknowledged that

"a state may go too far in regulating what 'kind of animal' may be slaughtered," Pet. App. 10a, yet articulated no principle for discerning what regulations "go too far."

B. The FMIA's express preemption provision serves important structural and practical interests. Structurally, the preemption provision was one of several amendments the WMA made to the FMIA that marked the boundaries between federal and state authority over slaughterhouses. The FMIA leaves certain matters to the States—such as intrastate inspection programs—but federal law forbids a State from engrafting its preferred additions onto the federal scheme.

The FMIA's preemption provision serves two particularly important practical interests here. First, it ensures that FSIS inspectors and veterinarians will have an adequate opportunity to conduct the FMIA-required ante-mortem inspection of nonambulatory animals. Those inspections are often the best way to detect potentially devastating diseases that may be spreading through livestock populations; veterinarians can in turn alert other officials who can act to prevent widespread economic harm and disruption of the meat supply. Second, the preemption provision protects from state interference the federal inspectors who work at slaughterhouses every day. If enforced, Section 599f would have a significant potential to create confusion and confrontation between those federal inspectors and state officials.

ARGUMENT

The challenged provisions of California Penal Code § 599f are requirements about slaughterhouse operations within the scope of the FMIA, but they differ from the pertinent federal requirements. Accordingly, 21 U.S.C. 678 preempts those provisions of state law.

That result properly vindicates the division of federal and state authority established by the FMIA. The challenged provisions of Section 599f intrude on a federal scheme designed to ensure the safety of particular carcasses for human consumption, to implement a national policy of humane handling, and to detect diseases that could destabilize the Nation's meat supply by devastating livestock populations. The FMIA therefore precludes enforcement of California's law at federally inspected slaughterhouses.

A. The Federal Meat Inspection Act Expressly Preempts The Challenged Provisions Of Section 599f As Applied To Swine Slaughterhouses

The FMIA expressly preempts the challenged provisions of Section 599f as applied to swine slaughterhouses because California's law would dictate how federally regulated slaughterhouses must conduct operations involving nonambulatory animals.

1. Section 599f is preempted under the plain terms of 21 U.S.C. 678

Because 21 U.S.C. 678 expressly addresses preemption of state law, analysis of the preemption question "must in the first instance focus on the plain wording of [that provision], which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). The FMIA preempts state "[1] [r]equirements [2] within the scope of [the FMIA] [3] with respect to premises, facilities and operations of any establishment at which inspection is provided under [the FMIA], [4] which are in addition to, or different than those made under [the FMIA]." 21 U.S.C. 678. The provisions of Section 599f challenged here satisfy each of those conditions.

a. "Requirements"

i. Section 599f sets forth "requirements" in the ordinary sense of the word. As explained in detail below, most of the challenged provisions of Section 599f—the bans on "receiv[ing]" and "hold[ing]" nonambulatory swine, and on "process[ing]" and "butcher[ing]" their meat—are direct regulations of slaughterhouse activities committed to exclusive federal control under 21 U.S.C. 678.

ii. Whether Section 599f(b)'s ban on "sell[ing] meat or products of nonambulatory animals for human consumption" is a "requirement" with respect to slaughterhouse activities under 21 U.S.C. 678 calls for further analysis.

The FMIA does not in general expressly preempt state regulation of the commercial sales activities of slaughterhouses. That said, it does preempt "[m]arking, labeling, packaging, [and] ingredient requirements." 21 U.S.C. 678; see *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 528-532 (1977) (interpreting the second sentence of 21 U.S.C. 678). And to some extent the FMIA preempts state judgments about what finished meat and meat products are fit for commerce and human consumption, in that the FMIA defines certain conditions that render such products "adulterated" (21 U.S.C. 601(m)), bans commerce in adulterated products (21 U.S.C. 610(c)(1)), and authorizes concurrent state enforcement on that subject only when "consistent with requirements under [the FMIA]" (21 U.S.C. 678). Section 599f(b)'s sale ban could reasonably be characterized as an impermissible effort to add a class of adulteration unrecognized in federal law.

But in the context of Section 599f's other provisions, the sale ban is better understood as an adjunct to Cali-

fornia's immediate euthanasia requirement. Textually, the sale ban is part of a single provision that also bans "process[ing]" and "butcher[ing]." Cal. Penal Code § 599f(b) (West 2010). That provision is calculated to enforce Section 599f's immediate-euthanasia requirements (*id.* § 599f(c) and (d)) by depriving slaughterhouses of a market for products produced in violation of those requirements. As the sponsor of the 2008 amendment explained, the revised Section 599f "will create an economic disincentive to [certain slaughterhouse] practices [regarding nonambulatory animals] by prohibiting the sale of any meat or products from such animals." C.A. App. 289.

Moreover, as a practical matter, permitting California to enforce its preferred slaughterhouse practices through 599f(b)'s sale ban would undermine Congress's preemptive objective in 21 U.S.C. 678. If this sale ban escapes express preemption, then nearly any state slaughterhouse regulation might similarly escape the FMIA's preemption provision through the expedient of recharacterizing the regulation as a ban on downstream sales of products produced in a manner disapproved by the State. This Court, however, has refused to distinguish between two substantively identical requirements enforced by state regulations applied at different stages of the production and marketing of a federally regulated product, because "treating [such] restrictions differently for pre-emption purposes would make no sense." *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 255 (2004).

The question presented in *Engine Manufacturers* was whether a federal statute preempting "any standard relating to the control of emissions from new motor vehicles" applied to a California rule prohibiting vehicle fleet

operators from purchasing or leasing vehicles that did not comply with stringent emissions requirements. 541 U.S. at 248-249, 252 (quoting 42 U.S.C. 7543(a)). California argued that its regulation of vehicle *purchases* was not preempted because (in its view) the federal statute reached only a "*production* mandate that requires *manufacturers*" to comply with certain standards. *Id.* at 253 (citation and brackets omitted). This Court rejected that distinction because it "confuse[d] standards with the means of enforcing standards," *ibid.*, and as a practical matter, "[t]he manufacturer's right to sell federally approved vehicles is meaningless in the absence of a purchaser's right to buy them," *id.* at 255.[4] Likewise here, the sale ban is simply one means (among many in Section 599f) to enforce the requirements California would impose on the handling of nonambulatory animals. The FMIA's goal of uniform federal requirements for handling and inspecting livestock at slaughterhouses would be meaningless if a State could insist that meat is unsalable unless it was produced in conformity with the State's own preferred requirements. Thus, like the other challenged provisions of Section 599f, the sale ban is a requirement about how slaughterhouses must handle nonambulatory animals.

This Court's precedents giving expansive reach to the word "requirement" in express preemption provisions confirm that understanding. *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), interpreted an express preemption clause providing that "[n]o requirement or prohibition based on smoking and health shall be im-

[4] Although the statute at issue in *Engine Manufacturers* referred to "standards" while 21 U.S.C. 678 refers to "requirements," this Court has used precedents construing one to inform the other. See, *e.g.*, *Williamson* v. *Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1135 (2011).

posed under State law with respect to [certain aspects of cigarette promotion]." *Id.* at 515. The *Cipollone* plurality found that provision to "sweep[] broadly," and emphasized that it embraced common-law damage actions because "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.* at 521 (citation omitted); accord *id.* at 548-549 (opinion of Scalia, J.). Majorities of the Court have repeatedly reaffirmed this principle in construing other express preemption provisions referring to "requirements." See *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 323-324 (2008); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 510-511 (1996) (opinion of O'Connor, J.); *id.* at 504 (opinion of Breyer, J.).

Cipollone, like *Engine Manufacturers*, thus recognizes that a State may impose a requirement by applying economic pressure to a commercial transaction. Accordingly, where federal supremacy is concerned, a state law that exerts clear and focused economic pressure on the conduct of a federally regulated activity is no less a "requirement" with respect to that activity than a direct prescriptive regulation would be. That principle logically applies whether the state law is enforced through a criminal prohibition (as here) or a cause of action in tort (as in *Cipollone*). Indeed, as an economic matter, the outright ban on sales here may be more potent than the contingent damages liability at issue in *Cipollone*. See *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 446 (2005) (contrasting the "pressure caused by a State's power to impose sales and use restrictions" with the "more attenuated pressure exerted

by common-law suits"). Thus, the sale ban in Section 599f(b) is for all practical purposes a requirement about how nonambulatory animals are to be handled by a slaughterhouse.[5]

b. "Within the scope of [the FMIA]"

The challenged provisions of Section 599f are "within the scope" of the FMIA. The FMIA and USDA's regulations apply to both activities conducted at a slaughterhouse's permanent physical plant and activities involving delivery vehicles once they have entered the slaughterhouse's premises. See, *e.g.*, FSIS Directive 6900.2, at 6 (Pet. Br. App. 114-115) (discussing inspection authority over vehicles); 21 U.S.C. 606(a) (Supp. II 2008) (conferring authority over "every part of [the] establishment" where "meat food products [are] prepared for commerce"). Thus, for the entire time the animal is within the slaughterhouse's premises, the animal and its products are within the physical scope of the FMIA's application.

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[5] Even if the sale ban in Section 599f(b) is not properly regarded as a "requirement[]" preempted by 21 U.S.C. 678, the effect such a ban would have on the preempted subject matters described in 21 U.S.C. 678 would likely lead to the conclusion that the ban is preempted under conflict preemption principles, because it would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941), in implementing uniform practices for humane handling, inspection, and slaughter of animals to produce meat for human consumption. In that analysis, the savings clause in 21 U.S.C. 678 would not protect Section 599f(b) because the savings clause authorizes only state laws "consistent with [the FMIA]" and "does *not* bar the ordinary working of conflict pre-emption principles," *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869 (2000). Petitioner does not, however, ask this Court to decide any issue of conflict preemption. See Pet. i-ii.

Furthermore, each stage of slaughterhouse operations at which Section 599f might apply is within USDA's expansive regulatory authority under the FMIA:

- USDA regulates the humane handling of swine—whether nonambulatory disabled, nonambulatory but not disabled, or otherwise—upon the animals' arrival at the slaughterhouse, even before the animals are identified to FSIS for inspection. See, *e.g.*, 44 Fed. Reg. 68,813 (1979) (promulgating 9 C.F.R. 313.1-.2, regulating humane handling); see also FSIS Directive 6100.1 (Part VIII.A.1) (Pet. Br. App. 47) ("All animals that are on the premises of the establishment, on vehicles that are on the premises, or animals being handled in connection with slaughter (e.g., livestock on trucks being staged for slaughter) are to be handled humanely.").[6]

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[6] The fact that USDA's Part 313 humane-handling regulations reflect a policy originally enacted by Congress in a law separate from the FMIA does not place those regulations outside "the scope of [the FMIA]," 21 U.S.C. 678. Congress itself announced in the HMSA 1978 that it was "amend[ing] the [FMIA] to *require* that meat inspected and approved *under such Act* be produced" in accordance with the policy in the HMSA. Pmbl., 92 Stat. 1069 (emphasis added). And USDA understood in promulgating the Part 313 humane-handling regulations that it was "amend[ing] the Federal meat inspection regulations to implement Pub. L. 95-445," *i.e.*, the HMSA 1978, which amended the FMIA. 44 Fed. Reg. at 68,809.

Moreover, even if the HMSA 1978 did not bring the preexisting HMSA within the scope of the FMIA, that would not vindicate respondents' position. The question for preemption purposes is whether the handling of nonambulatory animals in connection with slaughter is within the scope of the FMIA, not whether that subject is also within the scope of some other federal law. Because a nonambulatory animal's

- The ante-mortem inspection of nonambulatory swine presented to FSIS for inspection is subject to longstanding regulations under the FMIA. See, *e.g.*, 35 Fed. Reg. 15,554 (1970) (promulgating Part 309 ante-mortem inspection regulations and Part 311 disposition regulations on the authority of, *inter alia*, the FMIA).
- The processing and butchering of carcasses into meat and meat food products is regulated under the FMIA. See, *e.g.*, 35 Fed. Reg. at 15,554 (promulgating Part 318 processing regulations on the authority of, *inter alia*, the FMIA).

Accordingly, the provisions of Section 599f addressing the same subjects are also within the scope of the FMIA. Indeed, the challenged provisions of Section 599f would be within the scope of the FMIA even in the absence of those federal regulations. That USDA has in fact used the FMIA to regulate matters addressed by the challenged provisions of Section 599f only underscores the intrusiveness of California's law and the need to confirm federal supremacy over the areas described by the FMIA's express preemption provision.[7]

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condition may signal disease, the handling of such an animal in connection with ante-mortem inspection is within the scope of the FMIA. For example, USDA undoubtedly could require—irrespective of humane-handling considerations—that nonambulatory animals be held for examination and disposition by a veterinarian.

[7] Petitioner states that slaughterhouses generally purchase swine once they are on the slaughterhouse premises. Pet. Br. 46 n.18. Assuming that is correct, Section 599f(a)'s ban on "buy[ing]" nonambulatory swine is functionally no different from—and preempted for the same reasons as—Section 599(a)'s ban on "receiv[ing]" such swine and Section 599f(c)'s ban on "hold[ing]" such swine.

*c. "With respect to * * * operations"*

The challenged provisions of Section 599f address slaughterhouse "operations." The FMIA contains two preemption provisions and a savings clause in 21 U.S.C. 678, which divide the Act's concerns into several subject matters: "premises, facilities and operations"; "recordkeeping"; "[m]arking, labeling, packaging, [and] ingredient requirements"; and "other matters." In that context, the "operations" of a slaughterhouse are best understood as "action[s] done as a part of practical work or involving practical application of a * * * process" at the slaughterhouse. *Webster's New International Dictionary* 1707 (2d ed. 1958). Consistent with that definition, 21 U.S.C. 623(a)—which exempts personal and custom slaughtering from FMIA regulation—uses the term "operations" to refer to "the slaughter of animals and the preparation of the carcasses, parts thereof, meat and meat food products."

Section 599f imposes requirements "with respect to" slaughterhouse "operations" just as the FMIA's humane-handling and inspection provisions do. Both federal and California law address practical aspects of how animals must be handled by the slaughterhouse in connection with slaughter, and the conditions under which processing of the carcasses into meat and meat food products must occur.

Consequently, the FMIA's savings clause does not rescue Section 599f. It permits States to "mak[e] requirement[s] or tak[e] other action, consistent with [the FMIA], with respect to any *other* matters regulated under [the FMIA]." 21 U.S.C. 678 (emphasis added). Because Section 599f seeks to regulate slaughterhouse "operations" properly "within the scope of [the FMIA],"

it cannot be said to regulate the "other matters" governed by the savings clause. *Ibid.*

d. "In addition to, or different than"

Section 599f's requirements regarding nonambulatory swine are not the same as those prescribed under the FMIA. Federal regulations do not prohibit the receipt or holding of nonambulatory swine; to the contrary, they contemplate that such animals will be received, and they address how animals will be humanely handled and held. See 9 C.F.R. 309.2(b) (governing nonambulatory disabled livestock); FSIS Directive 6900.2, at 14-15 (Pet. Br. App. 125-127) (same); 9 C.F.R. 313.2(a)-(c) (governing driving of livestock). Likewise, there is no flat prohibition in USDA regulations on processing the meat of nonambulatory swine for sale; instead, the FMIA provides a system of ante-mortem and post-mortem inspections designed to pass carcasses of nonambulatory swine for human consumption in whole or in part if appropriate. See 9 C.F.R. 309.2(n); 9 C.F.R. Pt. 311; see also *Ruth Packing*, 430 U.S. at 530-532 (applying the "in addition to, or different than" language in the second sentence of 21 U.S.C. 678).

By generally permitting state-law requirements that parallel federal requirements—those that are not "in addition to, or different than" the federal requirements—21 U.S.C. 678 reflects a determination not to exclude States entirely from the field of slaughterhouse regulation. The FMIA is not unique in this respect. For example, in *Bates*, the Court adopted a "parallel requirements" reading of a preemption provision that "prohibit[ed] only state-law * * * requirements that are '*in addition to or different from*' the * * * requirements under [federal law]." 544 U.S. at 447. Under that

interpretation, "a state-law * * * requirement is not pre-empted * * * if it is equivalent to, and fully consistent with, [the federal law's] provisions." *Ibid.*; see also *Lohr*, 518 U.S. at 513 (opinion of O'Connor, J.) ("[State law] claims are not pre-empted by [a statute reaching requirements 'different from, or in addition to' federal requirements] to the extent that they seek damages for * * * violation of federal requirements.").

This parallel-requirements interpretation does not save Section 599f, but it may save other state laws. Respondents were thus mistaken in arguing to the court of appeals that if the challenged provisions of Section 599f are preempted, then the FMIA would also forbid prosecuting the operator of a federally inspected slaughterhouse under state laws prohibiting cruelty to animals. See, *e.g.*, Non-State Resp't C.A. Reply Br. 22-24. To the contrary, to the extent such state laws are applied to conduct that violates the FMIA or FSIS regulations, they are "consistent with [the FMIA]" and do not impose "[r]equirements * * * in addition to, or different than those made under [the FMIA]," 21 U.S.C. 678, and therefore are not expressly preempted. By contrast, respondents have not suggested how the challenged provisions of Section 599f could be similarly limited in their application.

2. The court of appeals' reasons for upholding Section 599f are unpersuasive

The Ninth Circuit concluded that 21 U.S.C. 678 does not preempt the challenged provisions of Section 599f because the California law regulates "the kind of animal that may be slaughtered," and the FMIA "doesn't preclude states from banning the slaughter of certain kinds of animals altogether." Pet. App. 9a. That reasoning is

mistaken because it draws an irrelevant distinction and fails to respect 21 U.S.C. 678's focus on "requirements."

Even if Section 599f can be described as regulating a "kind of animal," the law operates by regulating slaughterhouse operations within the FMIA's scope. It is therefore expressly preempted. The court of appeals, however, suggested something more was necessary for preemption: The court acknowledged that "[i]t is possible that a state may go too far in regulating what 'kind of animal' may be slaughtered," Pet. App. 10a, and it volunteered hypothetical examples of impermissible "kind of animal" regulations that "could effectively establish a parallel state meat-inspection system," *id.* at 11a. But the court offered no statutory basis for its view that only some "kind of animal" regulations would be preempted, and it refused to articulate any principle for discerning which regulations "go too far." *Id.* at 10a-11a. Those analytical gaps reveal that characterizing a state law as regulating what "kind of animal" may be slaughtered is fundamentally unhelpful in deciding whether the FMIA preempts the law.

The court of appeals' "kind of animal" construct was borrowed from *Cavel International, Inc.* v. *Madigan*, 500 F.3d 551 (7th Cir. 2007), cert. denied, 554 U.S. 902 (2008), and *Empacadora de Carnes de Fresnillo* v. *Curry*, 476 F.3d 326 (5th Cir.), cert. denied, 550 U.S. 957 (2007), which both upheld state prohibitions on the slaughter of horses for human consumption. See Pet. App. 9a (explaining the state laws at issue governed only "what types of meat may be sold for human consumption in the first place") (quoting *Empacadora*, 476 F.3d at 333).

Assuming, *arguendo*, that *Cavel* and *Empacadora* were correctly decided, it is not because horses are a

"kind of animal," but rather because the bans at issue did not require anything different from federal law with respect to slaughterhouse operations within the FMIA's scope. Most obviously, the quality of being a horse is immutable and known to all involved well before the animal is within the physical or regulatory reach of the FMIA. Cf. Pet. App. 39a ("A pig is a pig. A pig that is laying down is a pig."). By contrast, immobility is a mutable characteristic that may change even while the animal is on the premises of a federally regulated slaughterhouse. For example, the record below shows that swine that are nonambulatory upon arrival at a slaughterhouse often suffer only from fatigue and stress and are able to stand and walk after rest and monitoring. See J.A. 15 (Terrill Decl. ¶ 5). Conversely, USDA regulations governing the good repair of slaughterhouse facilities illustrate that disabling injury to an animal's limbs on slaughterhouse premises is not unknown. See 9 C.F.R. 313.1. The Ninth Circuit's decision allowing California to regulate slaughterhouse operations based on a characteristic that can and does appear and disappear after an animal is already on a slaughterhouse's premises cannot be squared with the FMIA's prohibition of such state-law requirements.

B. Express Preemption Under The FMIA Serves Important Policy Interests

The FMIA's express preemption provision is an important component of federal policy.

1. Express preemption under the Federal Meat Inspection Act is a key part of the balance Congress has struck between federal and state regulation of slaughterhouses

As described above (pp. 7-9, *supra*), the FMIA creates a largely—but not exclusively—federal system for the regulation of slaughterhouses. Meat production and distribution is a largely interstate activity. As Congress found:

> [T]he major portion [of meat and meat food products] moves in interstate or foreign commerce. * * * Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers.

21 U.S.C. 602. Thus, achieving the FMIA's purposes requires a regulatory regime for slaughterhouses that is generally uniform and unencumbered by state-to-state variations.

Reflecting a balance of interests, however, the FMIA does not demand national uniformity in every aspect of slaughterhouse regulation. For example, the savings clause in 21 U.S.C. 678 provides that the States retain

authority over "other matters" not addressed in the express preemption clauses, so long as their laws are "consistent with" the FMIA. The FMIA also authorizes cooperative federal-state implementation of state meat-inspection regimes for slaughterhouses producing meat only for intrastate consumption. See 21 U.S.C. 661(a). The findings above, the express preemption provision, the savings clause, and the intrastate inspection framework were all added to the FMIA together in 1967, see WMA §§ 2, 15, 16, 81 Stat. 587, 595, 600, and together they reflect the particular balance Congress struck in this area.

Accordingly, if a State is concerned only about meat inspection at intrastate slaughterhouses, it may seek FSIS approval of an intrastate inspection regime. Twenty-seven States have done so; California is not among them. See FSIS, *List of Participating States*, http://www.fsis.usda.gov/regulations_&_policies/Listing_of_Participating_States/index.asp (Aug. 13, 2007). Alternatively, any interested person (including a State) may petition USDA to revise its FMIA inspection regulations (or to use authorities other than the FMIA to regulate slaughterhouse operations). See 9 C.F.R. Pt. 392. USDA has been quite active on matters concerning nonambulatory animals: Through a series of measures in 2004, 2007, and 2009, USDA has required the condemnation of nonambulatory disabled full-grown cattle. See note 1, *supra*. And USDA recently solicited comment on two rulemaking petitions to extend that cattle rule to veal calves, or—of relevance to petitioner's members

who operate swine slaughterhouses—to all livestock. 76 Fed. Reg. 6572 (2011).[8]

What a State may not do is engraft its preferred additions onto the federal regime. Yet that is precisely the aim and effect of Section 599f. As the sponsor of the 2008 amendment to Section 599f explained, the amendment was necessary in his view because under "the USDA inspection system, there is * * * no adequate system in place to prevent [nonambulatory disabled] animals from continuing to enter our food supply." J.A. 58. The FMIA's preemption provision is intended to preclude such disuniformity in the operations of slaughterhouses serving the interstate market.

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[8] FSIS's action on the rulemaking petition addressed to all livestock could affect some of the issues in this case. That petition asks for a rule that nonambulatory disabled animals "be condemned and humanely euthanized in accordance with 9 C.F.R. § 309.13." Farm Sanctuary, *Petition to Amend 9 C.F.R. § 309.3(e)* 2, http://www.fsis.usda.gov/PDF/Petition_Humane_Handling.pdf (Mar. 15, 2010). On the one hand, if FSIS adopts the rule of condemnation that Farm Sanctuary seeks, then Section 599f(b) would likely not be expressly preempted in full because its prohibition on "process[ing], butcher[ing], or sell[ing] meat or products of nonambulatory animals" would—in its application to nonambulatory *disabled* animals—parallel FSIS's regulations prohibiting the slaughter or processing of condemned animals for human food, see 9 C.F.R. 309.13, Pt. 314. On the other hand, Section 599f(c) would still be "in addition to, or different than" USDA's regulations because that provision of state law flatly requires "immediate action to humanely euthanize the animal" while Farm Sanctuary seeks to apply USDA's orderly inspection and condemnation procedures to such animals.

2. Express preemption under the Federal Meat Inspection Act protects federal inspectors and helps protect the interstate meat production system

The FMIA's express preemption provision protects the FMIA's uniform scheme of inspections and humane-handling requirements from modification by state law. Where Section 599f is concerned, that protection serves at least two tangible federal interests: first, detecting diseases that threaten the meat supply, and second, protecting federal inspectors in the discharge of their duties.

a. The federal regulation of slaughterhouses is designed in part to ensure the safety of particular carcasses for human consumption, and in part to implement a uniform federal policy regarding the humane handling of livestock. But it also serves to detect serious diseases—such as foot-and-mouth disease—that may be spreading through livestock populations, threatening widespread economic harm and disruption of the meat supply.

FSIS follows an established protocol for handling such diseases. See generally FSIS Directive 6000.1 (rev. 1, Aug. 3, 2006) (Pet. Br. App. 34-43). As that Directive explains, "[o]utbreaks of certain animal diseases * * * can cause considerable economic and social disruption," "including disruption of livestock marketing and trade," and require "animal quarantine, depopulation, the cleaning and disinfecting of livestock environments, and the mass disposal of animal carcasses." *Id.* (Part V) (Pet. Br. App. 35). Reports of such diseases are transmitted to state authorities or to USDA's Animal and Plant Health Inspection Service. *Id.* (Part VII) (Pet. Br. App. 38-40). Those authorities will in turn trace the condition back to the farm and work to contain the spread of dis-

ease. Certain diseases also call for the United States to notify an intergovernmental entity, the World Organisation for Animal Health. See *id.* (Part V) (Pet. Br. App. 36).

That system of reporting and response relies heavily on ante-mortem inspections. Such inspections are often the best way to detect serious diseases, especially when standard diagnosis requires observing or taking the temperature of a live animal. See FSIS Directive 6000.1 (Part VI.C) (Pet. Br. App. 37-38) (listing "[a]ntemortem conditions that do not fit with the typical conditions for a specific domestic disease"); see also American Ass'n of Swine Veterinarians Pet. Stage Amicus Br. 4-11. For example, as FSIS's training materials for public health veterinarians explain, the initial clinical symptoms of foot-and-mouth disease for swine are "fever * * *, anorexia, reluctance to move, and squeal[ing] when forced to move," followed by vesicle (blister) formation. FSIS, *Disposition/Food Safety: Reportable and Foreign Animal Diseases* 66 (Jan. 29, 2009). Of those symptoms, only vesicles would be detectable post mortem, and would not be visible at all on a skinned and dressed carcass. Ante-mortem inspection is similarly important in detecting, for example, swine vesicular disease (*id.* at 72-73), vesicular stomatitis (*id.* at 57); and classical swine fever or "hog cholera" (*id.* at 76-77).

Section 599f would undermine that system for detecting and responding to serious diseases in livestock. By requiring immediate euthanasia, Section 599f would make it difficult for FSIS veterinarians to recognize a number of serious diseases, let alone report them to authorities that can act to contain an outbreak. Section 599f is particularly counterproductive in that it requires immediate euthanasia of the animals in which the dis-

ease has likely progressed the furthest, and which are thus the bellwethers of contagion in the herd. The FMIA's express preemption provision allows FSIS inspectors to recognize those serious diseases, unencumbered by state restrictions.

b. The FMIA's express preemption provision also protects FSIS inspectors. The FMIA goes beyond the federal regulatory schemes at issue in *Cipollone*, *Lohr*, *Bates*, and *Engine Manufacturers* in a notable respect: In addition to establishing requirements that regulate the conduct of private entities (as those other federal schemes do), the FMIA's inspection program locates federal personnel at the regulated facilities to implement the federal program. As a result, in marking the limits of state authority, 21 U.S.C. 678 not only protects the integrity of the federal regulatory scheme, but also insulates the federal inspectors who implement that scheme from state interference. Unwarranted intrusion by state law could hamstring FSIS inspectors in the discharge of their duties.

The challenged provisions of Section 599f illustrate how problematic such intrusion could be. The California law requires immediate euthanasia, apparently without regard to federal inspection requirements. Competing efforts by FSIS inspectors to maintain the federal inspection regime and by state officials to enforce Section 599f's requirements could put those two groups at loggerheads over basic matters of slaughterhouse operations: What does it take to deem an animal "nonambulatory" under Section 599f(c)? Must a professional veterinarian make that determination? How quickly must ante-mortem inspection take place so that an animal believed to be nonambulatory may be "immediate[ly] * * * euthanize[d]" under Section 599f(c)? What if no

federal inspector is immediately available? Must federal inspectors reorganize their inspection priorities to accommodate the urgency Section 599f appears to place on euthanasia? What if an animal becomes nonambulatory as it passes from the holding pens into the slaughter line?

Similar disputes could arise over humane handling. For example, a federal inspector could conclude that nonambulatory swine that are not disabled, but merely tired and overheated, would best be handled by revival with food, water, and shade. But Section 599f would seem to require immediate euthanasia, even if that more drastic (and economically wasteful) approach was unnecessary.

We assume California's prosecutors would exercise suitable discretion in enforcing Section 599f, but the decision below implies that FSIS inspectors themselves could in principle be criminally charged for their involvement. See Cal. Penal Code § 31 (West 1999) (treating persons who "aid and abet [a crime's] commission, or, not being present, have advised and encouraged its commission" as principals in the crime). Some of those disagreements might in principle be arbitrated through case-by-case application of conflict preemption principles. But the FMIA's express preemption provision is designed to avoid such confrontations altogether by categorically marking the limits of state authority. Thus, by preempting the challenged provisions of Section 599f in full, 21 U.S.C. 678 both insulates federal inspectors from state-law intrusion and protects the integrity of the FMIA's requirements.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2011

AMICUS CURIAE BRIEF

No. 10-224

In the Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,
Petitioner,

v.

KAMALA D. HARRIS,
Attorney General of California, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF SWINE VETERINARIANS, THE NATIONAL PORK PRODUCERS COUNCIL AND THE NATIONAL FARMERS UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER AND FOR REVERSAL OF THE NINTH CIRCUIT'S JUDGMENT

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INTEREST OF THE *AMICI CURIAE*

The American Association of Swine Veterinarians (AASV), the National Pork Producers Council (NPPC) and the National Farmers Union (NFU) submit this brief as *amici curiae* in support of the Petitioner.[1]

The AASV is a professional association of veterinarians who treat swine. The organization has approximately 1,300 members in practice, industry, and academia. The mission of the AASV is to increase the knowledge of swine veterinarians by promoting the development and availability of the resources which enhance the effectiveness of professional activities, creating opportunities which inspire personal and professional growth, advocating science-based approaches to industry issues, encouraging personal and professional interaction, and mentoring students to encourage life-long careers as swine veterinarians. AASV's website can be found at www.aasv.org.

As a national trade association for swine veterinarians, the AASV has a particular interest in representing the interests and perspective of the public health veterinarians (PHVs) who serve as federal inspectors in federally-regulated

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[1] The National Meat Association and the Respondents have all consented to the filing of this brief after receiving timely notice from the *amici curiae*.

As required by Rule 37.6, the AASV, NPPC and NFU state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

slaughterhouses. These professionals, who serve on the front lines of disease prevention at the slaughterhouse, have a strong interest in protecting the integrity of the federal ante-mortem and post-mortem inspection regime in order to protect animal and public health.

The NPPC is a § 501(c)(5) nonprofit corporation whose membership consists of forty-three state pork producer associations. The NPCC is a trade association dedicated to enhancing opportunities for the nation's thousands of pork producers. The NPPC conducts public policy outreach on behalf of its members and advocates for the passage and implementation of laws and regulations conducive to the production and sale of American pork in both domestic and international markets. The NPPC's website can be found at www.nppc.org.

As a trade association representing the interests of all pork producers in the United States, the NPPC has a particular interest in both (1) protecting the industry by promoting animal and public health, and (2) preserving the economic viability of the business of raising pigs for slaughter. Pork producers recognize the severe threat posed to the industry by the loss of a uniform federal meat inspection regime and the related increase in the potential for a cataclysmic outbreak of a foreign animal disease.

The NFU is a trade association of farmers operating small- and medium-sized farms throughout the United States. For more than 100 years, the NFU has been the grassroots organization of America's family farms and ranches. The NFU's mission is to advocate for the economic and social well-being of

family farmers, ranchers, fishermen, and for consumers and their communities, through education, cooperation and legislation. The NFU advocates for sustainable production of food, fiber, feed and fuel. The NFU's website can be found at www.nfu.org.

The NFU has an interest in representing the perspective of family farmers, including many pork producers. Family farmers recognize the severe threat posed to the industry by the loss of a uniform federal meat inspection regime and the related increase in the potential for a cataclysmic outbreak of a foreign animal disease.

This case will significantly impact meat inspection practices across the country. Swine veterinarians, pork producers, and family farmers have a strong interest in such practices, which directly affect their livelihoods and practices. They are also well-positioned to explain the impact of this case on hogs and on humans who consume hogs. The AASV, NPPC and NFU respectfully request that this Court reverse the judgment of the court of appeals.

SUMMARY OF ARGUMENT

The Ninth Circuit's ruling permits California to criminalize a federally-mandated process for inspecting pigs at the slaughterhouse. The decision places pork producers and slaughterhouses in an untenable Catch-22: either ignore federal regulations or violate a California penal statute. The decision also endangers public health by short-circuiting an ante-mortem inspection regime essential to detecting outbreaks of disease. Finally, the decision's economic impact could devastate the pork industry. For these

reasons, and those in the Petitioner's Brief, this Court should reverse.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN NOT APPLYING EXPRESS PREEMPTION TO PRESERVE THE INTEGRITY OF THE FEDERAL MEAT INSPECTION REGIME.

California Penal Code § 599f(c) makes it a crime for a slaughterhouse to hold a nonambulatory pig in California without immediately euthanizing it. Pursuant to the express preemption provision of the Federal Meat Inspection Act (the "FMIA"), 21 U.S.C. § 601, *et seq.*, however, "[r]equirements within the scope of [the FMIA] with respect to the premises, facilities and operations of any establishment at which inspection is provided . . . which are *in addition to, or different than* those made under this chapter may not be imposed by any state." 21 U.S.C. § 678 (emphasis added). Thus, if § 599f(c)'s immediate euthanization mandate is "different than" the FMIA's regulations, and if it concerns the "operations" of a federally-inspected slaughterhouse, it is expressly preempted. Both prerequisites for preemption are satisfied.

First, there can be little doubt that California's mandate is "different than" the federal regime. Pursuant to the regulations implementing the FMIA, federal inspectors must perform ante-mortem inspection of all livestock "offered for slaughter." 9 C.F.R. § 309.1. If livestock are found to be nonambulatory, they must be "separated from normal ambulatory animals and placed in [a] covered pen" for further inspection. *Id.* § 313.2(d)(1). By mandating

that slaughterhouses immediately euthanize nonambulatory pigs, the California law precludes a slaughterhouse from separating the pigs or putting them in a covered pen. Plainly, then, the California statute imposes requirements "different than" those mandated by the federal regulations.

The real question in this case is whether the mandate regulates the "operations" of federally-inspected slaughterhouses. On an ordinary reading of the term "operations," it does. Euthanizing a pig, as the California law requires, is unambiguously part of a slaughterhouse's "operations." The court of appeals nonetheless declared that § 599f(c) does not pertain to slaughterhouse operations. Its reasoning proceeded in three steps. First, citing cases from the Fifth and Seventh Circuits, the court ruled that the FMIA does not preclude states from regulating the "kind[s] of animals that may be slaughtered." Pet. App. 9a. Second, the court reasoned that states need not determine amenability to slaughter on a species-wide basis. Pet. App. 10a. Third, the court ruled that the California law is not preempted because nonambulatory pigs are a different "kind of animal" than ambulatory pigs. Pet. App. 10a-11a.

Even if the first two legs of the court of appeal's reasoning are correct – and they are dubious in themselves – the third fails. A nonambulatory pig is still a pig. Meat produced from healthy nonambulatory pigs is indistinguishable from the meat produced from healthy ambulatory pigs. Healthy pigs sometimes lie down due to fatigue. *See* Joe Vansickle, *Will 'Downer' Sows Be Next?* National Hog Farmer, July 15, 2008, *available at* http://nationalhog farmer.com/behavior-welfare/0715-groups-usda-ban/

(last visited Aug. 24, 2011) ("Pigs become fatigued from overexertion, turning them into downers when they are not given proper rest."); *see also* FSIS Directive 6900.2, Rev. 2, Ch. III, B (acknowledging that some hogs are fatigued and "tend to lie down and in some cases may get knocked down by others in the lot."). Doing so does not make them any less "pigs." Pigs with the *symptom* of nonambulation are simply not different "kinds of animals." Thus, even if states may regulate certain "kinds of animals" as categories within a species, California has not done so in § 599f(c). As such, its statute regulates the "operations" of federally-inspected slaughterhouses and is preempted by 21 U.S.C. § 678.[2]

II. CALIFORNIA'S IMMEDIATE EUTHANIZATION MANDATE WOULD HARM ANIMAL AND PUBLIC HEALTH.

The court of appeals' failure to apply the FMIA's preemption provision will have a potentially devastating impact on animal health and public health. The California law jeopardizes critical components of the federal meat inspection process. If it goes into effect, California will rely solely on a post-

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[2] This brief focuses primarily on § 599f(c). In addition, § 599f(a) prohibits slaughterhouses from buying nonambulatory pigs. Since slaughterhouses typically purchase pigs only after they have passed an ante-mortem inspection, the California law plainly interferes with a core operational function of a slaughterhouse: purchasing animals for slaughter. If pigs must be immediately euthanized before they can pass an ante-mortem inspection, California will have effectively prevented pigs from being purchased and placed in the food supply. Thus, § 599f(a) differs from the requirements of the FMIA and is preempted.

mortem inspection regime to detect swine diseases. For two reasons, this change in practice at slaughterhouses would have catastrophic results. First, as myriad federal regulations recognize, *ante-mortem* inspection of nonambulatory pigs is essential to the detection of infectious diseases, such as Foot and Mouth Disease ("FMD"). Second, because the California law prohibits slaughterhouses from receiving nonambulatory animals, California's post-mortem inspection regime is incomplete and ineffectual.

A. THE FMIA ESTABLISHES A UNIFORM ANTE-MORTEM INSPECTION PROCESS, WHICH IS CRITICAL TO PREVENT THE SPREAD OF INFECTIOUS DISEASES AMONG ANIMALS.

Under federal law, an ante-mortem inspection of nonambulatory swine is required at slaughterhouses. 9 C.F.R. § 309.1. Ante-mortem inspections serve at least two purposes: (1) to determine eligibility for slaughter, and (2) to serve as a front-line detector of communicable diseases. Ante-mortem inspection is particularly critical as a front-line defense against the spread of Classical Swine Fever (hog cholera) and Foot & Mouth Disease (a type of vesicular disease). Both of these foreign animal diseases ("FADs") must be detected early to prevent their spread.

By depriving Food Safety and Inspection Service (FSIS) of information gained by conducting ante-mortem inspections, California ties the hands of federal veterinarians (known as Public Health Veterinarians or PHVs) in fighting the spread of

dangerous illnesses among swine (and potentially humans). The FSIS has created a comprehensive training program for federal veterinarians on the ante-mortem inspection of animals at the slaughterhouse. *See generally* FSIS, Livestock Slaughter Inspection Training, *available at* http://www.fsis.usda.gov/FSIS_Employees/Slaughter_Inspection_Training/index.asp (last visited Aug. 24, 2011). Some of the information sought during the ante-mortem inspection can be determined only by viewing the animal while it is still alive.[3] *Id.* at 5. In fact, the FSIS manual contains an extensive list of symptoms of ailments that may only be determined through the abnormal body movement of the animal:

> Abnormal Body Movement
>
> Ante-mortem signs that indicate an animal may have a condition or disease referenced in the regulations can be associated with body movement and action, body position, condition, function, surfaces, discharges, and body odor. Some examples of the signs associated with body movement, action and position include:
>
> 1. Lameness or limping-sometimes the cause of lameness is rather obvious; sometimes not.

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[3] Ante-mortem inspection allows the federal veterinarian to see a nonambulatory pig "in motion." Nothing in the federal regulations suggests that an ante-mortem inspection of an animal "in motion" means that the animal must be ambulatory for the purpose of seeing the animal move. A pig may demonstrate sufficient motion for the ante-mortem inspection while lying down.

2. Stiffness and pain-lameness may be caused by arthritis in one or more joints.

3. Central Nervous System (CNS) diseases-certain diseases such as rabies and listeriosis can affect the brain and CNS. The animal may appear extremely nervous or restless, excessively anxious or upset, or stagger or circle.

4. Certain poisons and toxic residues that the animal has been exposed to may cause abnormal movement and action, such as staggering or circling.

5. Depression or disinterest may be a sign that the animal is in a dying or moribund state. A moribund animal may not respond to noises or other stimuli. Animals in a moribund condition are not eligible for slaughter.

6. It is possible that an animal that is depressed or fails to respond normally to stimuli could be under the influence of a tranquilizer. Tranquilized animals are not eligible for slaughter. Tranquilizers and other drugs have specific withdrawal periods that must elapse before the animal is eligible for slaughter.

7. An animal may be disoriented and run into things or butt its head against objects.

8. Animals may scratch excessively or rub their hide against objects. Scratching and rubbing associated with hair loss may indicate that the animal has lice or mange infestation.

Scabies is a mange condition that is a reportable disease. The PHV must report this condition to other health agencies. These agencies may want to take skin scrapings from the animal to confirm the diagnosis.

9. Animals may have muscle tremors or shivering, hold their head to one side, or have any number of abnormal gaits.

10. Animals may strain and assume abnormal body positions. For example, urinary or intestinal disorders may cause straining and abnormal positions such as arching of the back, tucking in of the abdomen (stomach), and extending the neck and tail.

11. An animal may have difficulty in rising or be unable to get up at all or be standing but unable to walk (or ambulate). These animals may be recumbent nonambulatory or standing nonambulatory for a variety of reasons ranging from an injury to severe illness or depression. All nonambulatory livestock must be examined by the PHV. The PHV may choose to examine these animals where they are rather that move them to the U.S. Suspect pen to avoid unnecessary handling and pain or injury to the animal. All cattle that are nonambulatory when presented for ante-mortem must be condemned.

Id. at 11-12. In addition, the FSIS manual requires that federal veterinarians take the temperature of each animal during the ante-mortem inspection process, which is impossible post-mortem. *Id.* at 11, 14. Certain animals are condemned on the basis of...

their body temperature alone. *Id.* at 14; 9 C.F.R. § 309.3(c). Taken together, these federal ante-mortem inspection procedures are critical in preventing the spread of diseases, such as hog cholera and swine vesicular disease. *See* 9 C.F.R. § 309.5 and 9 C.F.R. § 309.15.

The FSIS recognizes at least fourteen (14) different FADs. FSIS, Entry Training for the PHV, "Reportable and Foreign Animal Diseases," at 1, *available at* http://www.fsis.usda.gov/PDF/PHVj-Reportable_and_Foreign_Animal_Diseases.pdf (last visited Aug. 24, 2011). Among those FADs, perhaps the most serious threat is posed by FMD. One of the first visible symptoms of FMD (or swine vesicular disease, which is very similar) is lameness, which is a symptom tested for under the ante-mortem inspection regulations. *Id.* at 47; *see also Foot and Mouth Pocket Guide*, USDA/APHIS, NPPC, Iowa State University and AASV 25 (2011), *available at* http://www.cfsph.iastate.edu/pdf/foot-and-mouth-disease-pocket-guide (last visited Aug. 26, 2011) (stating that the first visible sign of FMD is a lame pig). One can only detect this symptom if the infected pig is given time to rest and stand back up after it has recovered from being nonambulatory. However, this inspection will never occur in California if the nonambulatory pigs are already euthanized. In short, the California law requires that a nonambulatory pig be euthanized before a veterinarian has had the opportunity to observe any of the early symptoms of FMD, which include lameness, shaking of the feet, salivation and drooling, dullness and lack of appetite, vesicles on the mouth, etc. *See* D. Herenda, *Manual on meat inspection for developing countries*, Food and Agriculture Organization of the United Nations, Ch. 4,

2000, *available at* http://www.fao.org/docrep/003/t0756e/T0756E05.htm (last visited Aug. 24, 2011).

The proper response to early detection of FMD through ante-mortem inspection is a quarantine of the facility. California's law dismantles this critical early warning detection system that has developed through FSIS regulations and makes a severe FMD outbreak in the United States a very real threat.[4] Without an immediate quarantine of the slaughterhouse, the disease will spread quickly.

In short, § 599f(c) turns federal veterinarians into coroners tasked only with the autopsies of a newly-expanded number of often-healthy nonambulatory swine that were subject to immediate euthanization. By mandating "immediate" euthanization of such animals, federal veterinarians are deprived of the benefit of examination while the pig is still alive. The retrieval of such ante-mortem data would be a crime under § 599f(c), even though the ante-mortem inspection would allow for the only means of detection of certain communicable diseases in swine. Detecting a communicable disease early within a swine population could be critical in preventing the spread of the disease. Section 599f(c) places the health of both swine and humans at unnecessary risk. Immediately euthanizing nonambulatory swine does nothing to

---

[4] "It is probably no longer a question of 'if' but 'when' FMD strikes the US. Our only realistic hope of controlling a domestic incursion will be to diagnose it at the very earliest possible moment." Corrie Brown, *Update on foot-and-mouth disease in swine*, 9 Journal of Swine Health and Production 5 at 239-242 (2001), *available at* http://www.aasv.org/shap/issues/v9n5/v9n5p239.html (last visited Aug. 24, 2011).

improve the public health. Quite the opposite, it threatens the public health by preventing ante-mortem inspection of "downer" swine.[5]

B. CALIFORNIA'S LAW IS ALSO INEFFECTUAL TO THE EXTENT THAT IT WILL RELY SOLELY ON POST-MORTEM INSPECTION TO DETECT DISEASE.

If the California law goes in effect, federal veterinarians at California slaughterhouses will be left to rely entirely on a post-mortem inspection regime to identify FADs.

California's post-mortem inspection process, however, will not occur when the nonambulatory pig is not received by the slaughterhouse. The California law requires that pigs be turned away from the slaughterhouse premises, for example, if they are nonambulatory on the truck. Cal. Pen. Code § 599f(a) (banning a slaughterhouse from receiving a nonambulatory animal). A truck carrying livestock becomes part of the slaughterhouse premises as the vehicle physically enters the slaughterhouse grounds. *See* FSIS Directive 6900.2, Rev. 2, Ch. II, I. ("Once a

---

[5] The process of ante-mortem inspection can be viewed as an early-warning detection system that, when in operation, allows the on-site federal veterinarians to make the crucial decision of whether to separate or quarantine the entire swine herd. Post-mortem inspection alone would not allow for this type of early detection of communicable diseases. Regardless, § 599f supersedes the federal regulations that would allow for a nonambulatory pig to be safely separated from the rest of the herd and placed in a covered pen. *See* 9 C.F.R. § 313.2(d)(1).

vehicle carrying livestock enters, or is in line to enter, an official slaughter establishment's premises, the vehicle is considered to be a part of that establishment's premises. The animals within that vehicle are to be handled in accordance with 9 CFR 313.2."). Neither ante-mortem nor post-mortem inspections will ever occur with such livestock under the California regime, since the pigs are never allowed on the premises. Thus, California's reliance solely on a post-mortem inspection regime is ineffectual.

III. THE NINTH CIRCUIT'S DECISION WILL HARM THE PORK INDUSTRY.

The economic impact of California's immediate euthanization mandate on the California pork industry (and ultimately the national pork industry) could be devastating, for two reasons. First, as explained above, the mandate threatens an FMD outbreak. The impact of such an outbreak would be massive. Second, the mandate requires pork producers and slaughterhouses to dispose of healthy animals.

In addition to training federal veterinarians on how to conduct ante-mortem inspections, the FSIS has also issued a directive specifically describing the responsibility of federal veterinarians to prevent the spread of FADs. FSIS Directive 6000.1, Rev. 1, Part VI & VII, *available at* http://www.fsis.usda.gov/OPPDE/rdad/FSISDirectives/6000.1Rev1.pdf (last visited Aug. 24, 2011). An FSIS entry-level training module for PHVs describing the threat of FADs states:

> The volume of international passenger travel is steadily increasing. In 1980, 20 million passengers arrived in the United States on

> international flights. In 1995, this number rose 131 percent to 47 million [ ]. The airline industry expects this trend to continue. International travelers may unknowingly bring contaminated animal products from FAD infected countries. Contaminated foodstuffs have often served as a source of a FAD in the United States and other countries [ ].
>
> As the world population grows and animal production intensifies, the risks and impacts of FAD incursions increase. Today, infection at one premises can affect 300,000 laying hens, 100,000 hogs, or 100,000 feedlot cattle. When one company owns a large number of animals, frequent and rapid interstate movement occurs. This movement can spread infection across many states before clinical signs are manifest in the source herd.

See FSIS, Entry Training for the PHV, "Reportable and Foreign Animal Diseases," at 5, *available at* http://www.fsis.usda.gov/PDF/PHVj-Reportable_and_Foreign_Animal_Diseases.pdf (last visited Aug. 24, 2011). The spread of such FADs would have staggering impact on the livestock industries if not prevented through early detection. *Id.*

The physical swine losses in a domestic FMD outbreak would be substantial. As a benchmark, the current outbreak in South Korea has led to the loss of 33% of that country's swine herd at a cost of $1.75 billion. Bryan Kay, *South Korean farmers assess fallout of major outbreak of foot and mouth disease*, Christian Science Monitor, Feb. 24, 2011, *available at* http://www.csmonitor.com/World/Asia-Pacific/2011/

0224/South-Korean-farmers-assess-fallout-of-major-outbreak-of-foot-and-mouth-disease (last visited Aug. 24, 2011). The size of the hog market in the U.S. is eight times the size of the South Korean hog market. A study published by the U.S. Department of Agriculture's Animal and Plant Health Inspection Service estimated that the agricultural welfare loss from an FDM outbreak in California would be between $2.3 billion and $69 billion, depending on the length of the delay in detection. Tim E. Carpenter, Joshua M. O'Brien, Amy D. Hagerman, Bruce A McCarl, *Epidemic and economic impacts of delayed detection of foot-and-mouth disease: a case study of a simulated outbreak in California*, 23 Journal of Veterinary Diagnostic Investigation 1, at 26-33 (2011), *available at* http://fazd.tamu.edu/2011/01/epidemic-and-economic-impacts-of-delayed-detection-of-foot-and-mouth-disease-a-case-study-of-a-simulated-outbreak-in-california/ (last visited Aug. 24, 2011). In addition, an outbreak would likely cause consumers to irrationally shun pork (as they did during the recent H1N1 virus outbreak). *FMD Outbreak in South Korea Will Be Felt for Years*, National Hog Farmer, Mar. 21, 2011, *available at* http://nationalhogfarmer.com/pork-quality/fmd-outbreak-in-south-korea-will-be-felt-for-years-0321/ (last visited Aug. 24, 2011). Exports would shut down, and producers would simultaneously face

increased costs in eradicating the deadly disease.[6] This drop in exports would have a decisive impact:

> Economically, [FMD] is the most important disease of animals in the world. Period. Presence of this disease in a national herd destroys all export possibilities and hinders production so severely that profits for the domestic market evaporate. The disease itself has a low mortality rate but an incredibly high morbidity rate. Affected animals lose production for 2 to 3 weeks, and because of the highly contagious nature of the disease, all animals in a herd are infected. In industrialized systems of agriculture, this short period of poor growth is all it takes to wipe out profits, and countries with significant agricultural exports expend tremendous efforts

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[6] An important, but ancillary, cost of eradication is the disposal of diseased carcasses in order to comply with environmental regulations and prevent the contamination of groundwater from the leaching of the buried carcasses. The haphazard disposal of diseased carcasses of swine in South Korea has led to concerns of a looming environmental disaster created by the sheer volume of liquefied remains entering the water table. Philippe Messmer, *Public health worries after foot and mouth epidemic in South Korea*, Guardian Weekly, Feb. 15, 2011, *available at* http://www.guardian.co.uk/world/2011/feb/15/south-korea-foot-mouth-mesmer (last visited Aug. 24, 2011); *see also* Dan Flynn, *Foot & Mouth May Taint South Korean Bottled Water*, Food Safety News, May 10, 2011, found at http://www.foodsafetynews.com/2011/05/south-korea-foot-mouth-disease-threat-to-bottled-water/ (last visited Aug. 24, 2011); *South Korea Reportedly Buries 1.4 Million Pigs Alive to Combat Foot and Mouth Disease*, The Huffington Post, Jan. 12, 2011, *available at* http://www.huffingtonpost.com/2011/01/12/south-korea-buries-pigs-alive_n_808119.html (last visited Aug. 24, 2011).

> to keep their national herds free of this virus. Once the virus is known to be present, export markets drop to zero, and without exports, domestic markets soon become glutted and worthless.

Corrie Brown, *Update on foot-and-mouth disease in swine*, 9 Journal of Swine Health and Production 5 at 239-242 (2001), *available at* http://www.aasv.org/shap/issues/v9n5/v9n5p239.html (last visited Aug. 24, 2011). FMD is so virulent that it has been identified as a national security threat. *See, e.g.*, Devlin Barrett, *Officials brace for foot-and-mouth scare*, USA Today, Oct. 15, 2007, *available at* http://www.usatoday.com/news/washington/2007-10-15-2261637160_x.htm (last visited Aug. 24, 2011) ("When there were fears of a foot-and-mouth outbreak in the Midwest this summer, the White House received secret briefings that highlighted the potential for old farm diseases to be new national security threats."). In short, a single FMD outbreak in the United States could destroy the pork industry.

Beyond the nightmare scenario involving an outbreak of FMD, California's immediate euthanization mandate requires the pork industry to needlessly cull healthy animals from the herd. Nonambulatory pigs are not necessarily permanently sick or diseased. A high percentage of pigs that become nonambulatory are simply fatigued and will likely recover within a short period of time. AASV standards require that a pig be given at least three (3) hours to recover after being taken to a covered pen. (The comparable standard of the American Veterinary Medical Association is two (2) hours.) In fact, the FSIS acknowledges that some hogs received at the

slaughterhouse are fatigued, need protective handling and "tend to lie down and in some cases may get knocked down by others in the lot." *See* FSIS Directive 6900.2, Rev. 2, Ch. III, B. Most of these pigs recover and stand up within that period of time and exhibit no symptoms of disease. Trucks entering slaughterhouse premises often have a number of temporarily nonambulatory pigs. Read literally, the California law requires the slaughterhouse to turn away any truck that contains one or more nonambulatory pigs before it enters the premises, even though the pigs are likely fatigued and not diseased.[7] Cal. Pen. Code § 599f(a) (stating that slaughterhouses are not permitted to "receive a nonambulatory animal.") Worse yet, such a truck could contain a pig with an undetected FMD infection.

It is difficult to measure the true economic cost that the California law imposes on the pork industry, given the vagaries of estimating how many pigs will happen to be fatigued as a truck enters the slaughterhouse premises on a given day. Pork producers, however, often operate with slim profit margins; the loss of even a few healthy pigs as the result of the California law could lead a producer to bankruptcy. A single adult pig going to slaughter is the result of thousands of dollars of investment in breeding, feed, medicine and

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[7] Note that while § 599f(c) requires a slaughterhouse (and only a slaughterhouse) to immediately euthanize, § 599f(d) allows stockyards, dealers, auctions and market agencies the choice of euthanizing or "provid[ing] immediate veterinary treatment." This distinction inexplicably singles out slaughterhouse operations and is inconsistent with the purported and misguided purpose of the California law to keep nonambulatory animals out of the food supply.

farm labor. The California law threatens to make raising pigs economically unviable.

CONCLUSION

For the foregoing reasons, as well as those in the brief of the Petitioner, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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August 29, 2011

AMICUS CURIAE BRIEF

No. 10-224

In The

Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

KAMALA D. HARRIS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The American Society for the Prevention of Cruelty to Animals ("ASPCA") submits this brief as *amicus curiae* in support of Respondents. As the oldest humane organization in North America, the ASPCA has played a unique role in the history of animal protection. Incorporated in 1866 by a special act of the New York State legislature, the ASPCA was the first humane organization to be granted law enforcement authority to investigate and make arrests for animal cruelty and other crimes committed against animals. A privately funded not-for-profit corporation with over two million supporters nationwide, the ASPCA's mission remains "to provide effective means for the prevention of cruelty to animals throughout the United States." To carry out its mission, the ASPCA enforces the New York State animal cruelty laws in the five boroughs of New York City, supports the investigation and prosecution of crimes against animals nationwide, advocates for animal welfare laws in states across the country, and educates law enforcement, prosecutors, veterinarians and the judiciary on proper responses to crimes against animals in their communities. The ASPCA offers this brief to assist the Court in its appreciation of the long legacy of state

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[1] Pursuant to Supreme Court Rule 37, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the brief's preparation or submission. The National Meat Association and all Respondents have consented to the filing of this brief after receiving timely notice from *amicus curiae*.

regulation of the treatment of animals in America, the support for that treatment and the role that California Penal Code Section 599f plays in that scheme.

SUMMARY OF ARGUMENT

The Ninth Circuit was correct in concluding that Section 599f of the California Penal Code is not preempted by the Federal Meat Inspection Act ("FMIA") since it does not regulate the "premises, facilities and operations" of slaughterhouses within the "scope" of the FMIA, but rather merely carries out a moral judgment about the kinds of animals that can be slaughtered for human consumption in the state of California. Put into proper context, by removing nonambulatory animals from the slaughter process altogether, Section 599f does what state animal cruelty laws have been doing for more than a century – implementing the states' inherent police power to decide which behaviors threaten public health, safety and morals such that treating them as criminal offenses is warranted. By preventing the well documented and grossly inhumane handling of animals that are too sick or disabled to stand and walk to their deaths, Section 599f is an integral element of California's anti-cruelty penal scheme, which like other state anti-cruelty laws, has expanded to better reflect evolving community sensibilities and to adapt to a growing social and scientific awareness of animals' capacity for pain and suffering.

While the provisions of the FMIA are no doubt applicable to animals that can be legally slaughtered and sold for human consumption in California, Section 599f functions by removing nonambulatory animals from those animals covered by the federal law. Therefore, as further explained herein and in Respondents' briefs, the Ninth Circuit's decision to reverse the District Court's ruling and to vacate the preliminary injunction is correct and should be affirmed.

ARGUMENT

I. STATE ANTI-CRUELTY LAWS ARE A LONG STANDING, LEGITIMATE EXERCISE OF THE STATES' INHERENT POLICE POWER

California Penal Code Section 599f is part of a statewide anti-cruelty law that protects animals from inhumane treatment by delineating acts that are prohibited and ascribing penalties for transgressions. Like California, states across the country have their own animal cruelty provisions also grounded in the traditional police power exercised in the interest of safeguarding the health, safety and morals of their citizens. Every state has exercised that power to enact varied and often extensive statutory penal law schemes requiring humane care and treatment of animals, prohibiting abuse, and preventing circumstances where cruelty could occur.

When called upon to review state anti-cruelty statutes, the courts have consistently held that laws

preventing cruel and inhumane treatment of animals fall squarely within the state's inherent police power. For more than 100 years, across an eclectic landscape of state anti-cruelty provisions covering virtually every animal species, the courts have reaffirmed this basic principle.

Early decisions affirmed the legitimacy of state anti-cruelty laws based in part on the state's inherent police power to enact laws to protect the property of its citizens.[2] Yet even these early cases articulated a broader moral imperative justifying state laws regarding animal welfare – that permitting the needless suffering of living beings offends the morals of civilized society and should therefore not be tolerated.

Whether upholding a conviction for being a spectator at a cockfight[3], trapping a fox in an inhumane manner,[4] shooting birds for entertainment,[5] conducting a "bloodless bullfight,"[6] beating a horse[7] or abusing a

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[2] *See, e.g., People v. Davis*, 72 N.J.L. 345, 352 (N.J. Sup. Ct. 1905) ("The act challenged in this case seems to us to be entirely within the police power of the legislature, over this class of property, in its right of restriction in the manner and purpose of its destruction.").

[3] *Commonwealth v. Hart*, 42 Pa. D. & C. 3d 180, 185 (1986).

[4] *Commonwealth v. Higgins*, 178 N.E. 536, 538 (Mass. Sup. Jud. Ct., Worcester 1931).

[5] *Davis*, 72 N.J.L. at 352.

[6] *C.E. Am., Inc. v. Antinori*, 210 So.2d 443, 443 (Fla. 1968)

[7] *Beamer v. Ohio*, 12 Ohio Cir. Dec. 4 (Ohio Cir. Ct. 1901).

dog,[5] the courts have sounded a recurring theme, that "public sentiment sustains [cruelty laws] as being no more than a proper exercise of the police power," *Goodwin v. Touhey*, 71 Conn. 262, 268 (Conn. 1898), and that the anti-cruelty "offense is against the public morals, which the commission of cruel and barbaric acts tend to corrupt. . . . It is directed against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those act[s]." *Higgins*, 178 N.E. at 538. *See also Antinori*, 210 So.2d at 444 ("[I]t is now generally well recognized that legislation that has for its purpose the protection of animals from harassment and ill treatment is a valid exercise of the police power.").

The state's power to protect animals from cruel treatment is in fact superior to the right of an animal owner to dispose of his property as he sees fit when his action runs counter to humane considerations which state law has chosen to regulate. For example, a conviction for conducting target practice on birds owned by a defendant was upheld because the defendant's property rights were not infringed by a law banning the shooting of birds purely for entertainment, when such behavior conflicted with prevailing social norms.

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[5] *People v. Bunt*, 118 Misc. 2d 904, 910 (N.Y. J. Ct. 1983) (New York anti-cruelty law constitutional as "reasonable extension of the state's police powers").

> No man may torture his animal property, even if he ha[s] the right to kill it. Nor may he use it, in the killing, as a means of amusement or pleasure to himself or others. That he may kill animals which he may own and which he may use as food is conceded, but in the interest of the humane destruction of such animal life the legislature, under the police power, has the power to specify in what manner such killing may not be done. This does not deprive him of any property right. It simply defines the mode in which he may exercise the right.
>
> To take life, or to torture for the enjoyment of the torturer, has never been considered among civilized people as an absolute right in the owner of property having life.

Davis, 72 N.J.L. at 352.

The courts have reaffirmed the states' right to decide how animals in their jurisdictions should be treated even when those animals are wildlife considered at times to be of the "nuisance" variety. In upholding a conviction for trapping a fox in a manner that would cause the animal prolonged pain and suffering, a Massachusetts court noted that:

> [T]he statute in question was intended to be in the interest of the public morals. . . . The capture of a wild animal contrary to the provisions of this statute undeniably must cause injury to the part of the body caught in the

> trap, with attendant pain. It falls within the general category of cruel treatment.

Higgins, 178 N.E. at 538.

The *Higgins* court held that while the defendant farmer had the right to protect his property, this consideration did not override the legislative intent to protect animals from cruel treatment and that the defendant "must yield his views of what is reasonable for that purpose to the judgment of the moral standard of the community as embodied in a statute." *Id.*

As state anti-cruelty laws have evolved to meet changing community standards, the courts have kept pace by affirming that these expanded statutory protections are valid exercises of the police power. In upholding a conviction for aiding or encouraging a cockfight by attending as a spectator, one court observed that while cockfighting may have been socially acceptable at one point in history, the activity is now considered barbaric and runs counter to prevailing societal norms. Therefore, laws outlawing cockfighting are valid exercises of the state authority.

> It is elementary that the governing authority in the exercise of its police power has both the prerogative and the responsibility of enacting laws which will promote and conserve the health, safety, morals and general welfare of society.
>
> Over the centuries the disposition to look upon such brutalities with favor or approval has gradually lessened, and compassion and

> concern for man's fellow creatures of the earth has increased to the extent that it is now quite generally thought that the witnessing of animals fighting, injuring and perhaps killing one another is a cruel and barbarous practice, discordant to human's better instincts and so offensive to his finer sensibilities that it is demeaning to morals.
>
> * * *
>
> [L]egislation against such practices as the fighting of animals is [therefore] justified for the purpose of regulating morals and promoting the good order and general welfare of society.

Hart, 42 Pa. D. & C. 3d at 183 (1986).

II. STATE ANTI-CRUELTY LAWS HAVE EXPANDED THEIR COVERAGE TO MEET CHANGING ANIMAL WELFARE NEEDS AND TO KEEP PACE WITH COMMUNITY STANDARDS AND MORALS

With firm grounding as a legitimate expression of the states' inherent police power, American laws criminalizing cruelty to animals have grown and thrived within their respective state penal law schemes and evolved to meet changing community morals regarding acceptable treatment of animals.

While state anti-cruelty laws may have originated as a means of safeguarding property rights, they now share a unifying underlying principle – that non

human animals are living beings that experience pain and suffering and therefore are worthy of protection under the law, independent of their legal status as property.

Today, animal cruelty is a crime in every state and a felony in forty-seven. Only Idaho, North Dakota and South Dakota are without any form of felony anti-cruelty provision. State laws differ as to the type of behavior that is criminalized (*e.g.*, neglect, affirmative abuse), the species or category of animal protected (companions/pets, farm animals, wildlife) and the attendant penalties for violations. Notably, most state anti-cruelty laws – at least on the misdemeanor level – protect a wide variety of animals including pets, livestock, wild animals and fish.[9]

The anti-cruelty laws typically apply to acts that cause unjustified suffering, injury or death, including behaviors like kicking, beating, shooting, stabbing and killing. Animal neglect, including the failure to provide adequate food, water, shelter and necessary

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[9] Many state misdemeanor anti-cruelty laws apply to "any animal" and define that term broadly. New York defines "any animal" as "every living creature except a human being." N.Y. Agric. & Mkts., Art. 26, § 350). *See also*, Cal. Penal Code § 599b ("animal" includes "every dumb creature"); Fla. Stat. Ann. § 828.02 ("every living dumb creature"); Me. Rev. Stat. Ann., tit. § 3907 ("Animal means every living, sentient creature not a human being."); 510 Ill. Comp. Stat. 70/2.01 ("every living creature domestic or wild, but does not include man"); N.J. Stat. Ann. § 4:22-17 ("living animal or creature").

veterinary care to an animal in one's care or custody, is also usually a crime in state anti-cruelty schemes.[10]

Over time, anti-cruelty laws have changed and expanded to reflect shifting community values, evolving science, and evidence establishing a strong connection between animal cruelty and violent crime against human victims.[11]

In order to incorporate these changes in public sentiment and morals, states have amended their cruelty laws to prohibit behaviors previously deemed socially acceptable, to increase penalties for the more serious forms of abuse, and to authorize sentencing options that afford court-enforced protection to potential victims of abuse (both human and animal).[12]

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[10] See generally, Leslie Sinclair *et al.*, *Forensic Investigation of Animal Cruelty, A Guide for Veterinary and Law Enforcement Professionals*, 1-5 (2006); Bruce A. Wagman *et al.*, *Animal Law, Cases and Materials*, 90-99 (2010).

[11] Studies conducted over the past twenty years by prominent psychologists and other experts have established a link between abuse to animals and humans by perpetrators of violence, and have been able to identify children's early involvement with animal abuse as an indicator of future violence directed at human and animal victims. *See, e.g.*, Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 ANIMAL LAW 81 (1999); *Cruelty to Animals and Interpersonal Violence: Readings in Research and Application* (Randall Lockwood & Frank R. Ascione, eds. 1998); Frank R. Ascione, *Domestic Violence and Cruelty to Animals*, 17 The Latham Letter 1 (1996).

[12] The law in twenty states now expressly authorizes courts to issue restraining orders protecting family pets in domestic

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For example, once viewed as culturally acceptable "sports," dog fighting and cockfighting are now crimes in every state. Pitting animals against each other and forcing them to fight, often to the death, for the amusement and financial gain of human handlers and spectators is no longer an activity that conforms to the prevailing morals of American society. Dog fighting is now a felony offense in every state.[13]

Cockfighting, which enjoyed a longer tenure as a lawful activity in the United States, was finally criminalized nationally when New Mexico and Louisiana joined the rest of the country and enacted bans in 2007 and 2008 respectively.[14] In an eloquent discourse on the subject, a Pennsylvania judge aptly summarized the rationale for criminalizing the cruel "sport":

> [I]f there is one commodity of which there is no need for a further supply, it is violence. If there is one school that the world can afford to miss, it is one for the tutoring of methods of violence, brutality and cruelty. In Pennsylvania

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violence, family offense, juvenile delinquency and criminal cases. Many courts also issue bans on defendants' contact with animals as part of sentencing in animal cruelty cases as a means of ensuring that offenders do not have access to potential animal victims.

[13] American Society for the Prevention of Cruelty to Animals, *Dog Fighting FAQ* (2010), www.aspca.org/fight-animal-cruelty/dog-fighting-faq.aspx (last accessed Oct. 4, 2011).

[14] N.M. Stat. Ann. § 30-18-9; La. Rev. Stat. Ann. § 14:102.23, 24.

> we can well do without a cockfight which involves nothing less than the torture of helpless animals.

Hart, 42 Pa. D. & C. 3d at 184-85.

In recent years, states have enacted a variety of other laws to protect companion animals, recognizing an expanding social focus on the health and welfare of those species who live closest to humans. These measures include statewide anti-chaining and anti-tethering laws for dogs;[15] regulation of "puppy mills" aimed at preventing a plethora of industry abuses that have led to large scale animal cruelty;[16] prohibitions

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[15] Tethering and chaining as a principal means of dog restraint have been identified as heightening the risk of aggressive behavior as well being especially inhumane for dogs who are social creatures and thrive on interactions with people and other dogs. Kenneth A. Gershman *et al.*, *Which Dogs Bite? A Case Control Study of Risk Factors*, 93 Pediatrics 6, 913-17 (June 1, 1994), http://pediatrics.aappublications.org/content/93/6/913 (last accessed Oct. 4, 2011); Karen Delise, *Fatal Dog Attacks: The Stories Behind the Statistics* (Anubis Press 2002).

Connecticut and Louisiana have recently enacted statewide anti-chaining bans while California, Hawaii, Texas, Virginia and Nevada limit chaining and tethering in their anti-cruelty provisions. Numerous localities, including most recently New York City, have enacted similar ordinances.

[16] A "puppy mill" is a commercial breeding operation that presents a high likelihood of animal suffering, because operators focus on profit, at the expense of the physical and emotional needs of the animals involved. Puppy mills are the principal source of purebred puppies sold in pet stores in the United States. Laws limiting the potential for abuse in puppy mills are already in place in many states, and were most recently enacted in Pennsylvania, Iowa, Oklahoma and Missouri, and regulate

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on certain methods of euthanasia of shelter animals;[17] and measures to ban or restrict painful and medically unnecessary practices such as the "debarking" (surgical modification of vocal cords to eliminate the ability to vocalize) of dogs and the declawing (onchyectomy) of cats.[18]

III. STATE ANTI-CRUELTY LAWS HAVE INCREASINGLY INCORPORATED PUBLIC MORAL JUDGMENTS ABOUT THE TREATMENT OF ANIMALS USED FOR FOOD

State anti-cruelty law schemes have evolved not just to offer more protection to companion animals but to improve the treatment of animals that people

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many facets of the dog production industry, including housing, veterinary care, feeding, rest between breeding cycles, exercise, recordkeeping and consumer disclosure requirements.

[17] Many states have outlawed particular methods of euthanizing animals, including use of decompression and gas chambers, gunshot and drowning, based on public sentiments about the proper way animals should die. State laws increasingly require use of the method with which much of society is most comfortable – an intravenous injection of a euthanasia solution administered by a trained professional.

[18] Mass. Gen. Laws Ann. ch. 140, § 138a (2010) (bans devocalization of a dog or cat except where medically necessary). *See also* 18 Pa. Cons. Stat. § 5511 (restricts debarking and partial amputation of the tail "tail docking" unless done by licensed veterinarian under anesthesia); N.J. Stat. Ann. § 4:19-38 (criminalizes debarking unless medically necessary and performed by licensed veterinarian with appropriate pain management); West Hollywood Mun. Code § 9.49.020 (2007) (prohibits nontherapeutic declawing).

use for food and fiber. This coverage and expansion into agricultural animals – the largest numbers of animals used by our society – is nothing but a natural progression and exercise of the traditional power of the states to enact laws to ensure that animals within their borders are not treated cruelly. Longstanding state provisions reflect the sentiment that even animals used for agricultural purposes should have their basic needs met and should be free from unnecessary pain and suffering.

The anti-cruelty laws have in fact *always* covered the treatment of agricultural animals at some level, and the laws have historically included language that places restrictions on the use, transport and handling of working animals and animals destined for our plates. Prohibitions on "cruel carrying," "overloading," "overdriving" and "overworking" are common elements of anti-cruelty schemes, have been in many state codes for hundreds of years, and may be applied to the use of farm animals to prevent them from being forced to endure conditions beyond their physical capacity.[19]

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[19] *See, e.g.*, Cal. Penal Code § 597 (criminalizes overdriving, overloading, driving when overloaded, or overworking any animal); Fla. Stat. Ann. § 828.12(1) (misdemeanor to unnecessarily overload, overdrive any animal or cause the same to be done); Ga. Code Ann. § 4-13-3 (unlawful for a person to unnecessarily overload or overdrive a horse); Md. Crim. Law Code Ann. § 10-604 (overdriving or overloading); N.Y. Agric. & Mkts., Art. 26, §§ 353, 359 (overdriving, overloading or carrying in cruel or inhumane manner); N.J. Stat. Ann. § 4:22-18 (carrying in a cruel or inhumane manner); Nev. Rev. Stat. Ann. § 574.100(1)(a) (overdriving or overloading); D.C. Code Ann. § 22-1002 (cruelly driving,

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States also impose criminal penalties for performing painful and unnecessary procedures on agricultural animals, such as tail docking, and to prevent methods of training horses to jump that cause loss of balance, discomfort and pain, including "poling" and "tripping."[20]

States' considerations for the proper treatment of animals have included regulation of the methods of transport that may pose danger for animals going to slaughter from distant locations. Recognizing that livestock often travel lengthy distances confined in trucks or other vehicles, the states have enacted provisions to ensure that the manner of such transport is safe, humane and hygienic. For example, state anti-cruelty laws prohibit transporting horses and chickens in "two tier" trucks and require compliance

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working when unfit for labor, carrying in cruel or inhumane manner). *See also Pittman v. State*, 18 Ala. App. 447 (Ala. Ct. App. 1922) (conviction upheld for animal cruelty involving overdriving a mule); *State v. Goodall*, 90 Ore. 485 (Ore. 1918) (cruelty conviction upheld where defendant rode a horse for several miles on two different occasions when it had an ulcerated sore on its back); *Commonwealth v. Wood*, 111 Mass. 408 (Mass. 1873) (conviction for overdriving horse); *Commonwealth v. Flannigan*, 137 Mass. 560 (Mass. 1884) (conviction for overdriving horse); *People v. Rourke*, 83 Misc. 2d 175 (Crim. Ct. New York Co. 1975) (permitting an injured carriage horse to work without providing necessary medical care constituted cruelty).

[20] *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-2910.09; Cal. Penal Code §§ 597g, 597n, 597q; Fla. Stat. Ann. § 828.12; 510 Ill. Comp. Stat. 70/5.01; N.Y. Agric. & Mkts., Art 26, § 368; Tex. Penal Code § 42.09.

with minimum standards of care that seek to prevent travelling compartments from being overcrowded and to provide warm, well-ventilated, sanitary and safe transport.[21]

Most recently, states including California, Colorado, Maine, Oregon and Michigan have enacted laws to prohibit farm animal confinement practices that the citizens of those states considered cruel.[22] Successful ballot initiatives in Arizona and Florida banned gestation crates for pregnant sows, and veal crates for calves.[23] California's ban went further to include the

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[21] *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 3-1312, 28-912 (regulating treatment and transport of horses going to slaughter and requiring adequate conditions and veterinary care and euthanasia as soon as practical for horses that become nonambulatory during transit); Cal. Penal Code § 599a; Conn. Gen. Stat. § 22-415 (prohibits carrying horse in a cruel manner or permitting it to suffer in transport); Fla. Stat. Ann. § 828.12; N.Y. Agric. & Mkts., Art. 26, § 359-a (vehicles transporting more than six horses must meet safety, ventilation and space requirements and cannot be more than one tier); R.I. Gen. Laws. § 4-1-7 (requires containers or crates used to transport live poultry to be sanitary and provide sufficient ventilation and warmth and that reasonable care to prevent suffering is provided); Tex. Penal Code § 42.09 (transportation of livestock animal in cruel manner prohibited).

[22] Cal. Health & Safety Code §§ 25990, 25991 (eff. 2015); Colo. Rev. Stat. § 35-50.5-102; Me. Rev. Stat. Ann., tit. 17, § 1039; Me. Rev. Stat. Ann., tit. 7, § 4020; Mich. Comp. Laws § 287.746; Or. Rev. Stat. § 600.150.

[23] *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-2910.07 (eff. 2010) (prohibits tethering or confining pregnant pigs, and calves raised for veal, for the majority of a day in a manner that prevents the animals from lying down, turning around and fully extending their limbs); Fla. Const. Art. X, § 21 (misdemeanor to

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intensive confinement systems (known as "battery cages") used for egg-laying hens.[24] These state anti-cruelty provisions prohibit forms of confinement that the citizens of each state have found unacceptable and cruel. California also banned the tail docking of cows and prohibited the sale of eggs brought in from out of the state, where the out-of-state conditions did not meet California's anti-cruelty decisions with respect to egg-laying hens.[25] The production of *pate de foie gras* – a pasty substance derived from the livers of ducks and geese who are force-fed so that their livers become abnormally enlarged – will be phased out in California by 2012 as the result of legislation banning the practice. The state of California made a decision, fully within its power to regulate the treatment of animals, that the method of creating *foie gras*

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confine or tether a pig during pregnancy in a manner that does not allow her to turn around freely).

[24] Cal. Health & Safety Code §§ 25990, 25991 (eff. 2015) (illegal to tether or confine a pig during pregnancy, a calf raised for veal, or an egg-laying hen for the majority of any day in a manner that prevents the animal from lying down, standing up, fully extending its limbs and turning around freely).

[25] Cal. Penal Code § 597n (prohibits cow and horse tail docking); Cal. Health & Safety Code § 25996 (prohibits sale or contract for sale of shelled eggs for human consumption when the eggs come from an egg-laying hen that has been confined in violation of § 25990).

should be eliminated, because it can cause extreme suffering and death to the animals involved.[26]

Just as they articulate the expected standard of care and humane handling of commercial animals in their jurisdictions, state laws also place restrictions on the types of animals that can be used for various purposes, including slaughter for human consumption, based on decisions about the potential suffering inherent in the slaughter process, and moral judgments about what animals should (and should not) be eaten by humans. Prohibitions on a variety of activities connected to trading in the flesh and fur of domesticated dogs and cats have been enacted in Delaware, Florida, New York, New Jersey and Oregon.[27] Several states including California, Illinois, Mississippi, Oklahoma and Texas have enacted either outright bans on the slaughter of horses for human

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[26] Cal. Health & Safety Code §§ 25980-81 (eff. 2012).

[27] *See, e.g.*, Del. Code Ann., tit. 11, § 1325A (criminalizes sale or barter of the flesh, fur or hair of a domesticated dog or cat or any product made in whole or part from the flesh, fur or hair of these animals); Fla. Stat. Ann. §§ 828.123, 1231 (bans killing dogs and cats to sell or give away pelts); N.Y. Agric. & Mkts., Art. 26, § 379; N.Y. Gen. Bus. Law § 399-aa (unlawful to trade in skin, hair, fur or flesh of a domesticated cat or dog); N.J. Stat. Ann. §§ 4:22-25.3, 25.4, 26 (bans trade in flesh, fur or hair of a domestic cat or dog or any products made therefrom); Or. Rev. Stat. § 167.390 (prohibits commercial uses of fur of a domesticated dog or cat if the fur is obtained by killing or maiming the animal).

consumption or laws that prohibit activities that facilitate slaughter and trade in horsemeat.[28]

IV. AS AN ANTI-CRUELTY LAW THAT EMBODIES THE STATE'S MORAL JUDGMENT ABOUT ACCEPTABLE TREATMENT OF ANIMALS, SECTION 599f IS NOT PREEMPTED BY THE FMIA

California built on its history and authority to implement anti-cruelty legislation when it enacted Section 599f, which prohibits the transport, holding and slaughter of animals for human consumption, when the animals cannot stand up and walk.

The impetus for Section 599f came in 2008 when the Humane Society of the United States released videotapes taken at the Westland/Hallmark slaughterhouse in California. The footage depicted nonambulatory cows being kicked, dragged, electrocuted, jammed with forklifts and sprayed in the nostrils with water to simulate drowning – in an effort to get them to stand up and walk to their slaughter.

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[28] Cal. Penal Code § 598c (prohibits knowing use of horses for human consumption); Miss. Code Ann. § 75-33-3 (defines "unfit for human consumption" to include horse and mule meat); Okla. Stat. Ann., tit. 63, § 1-1136 (unlawful to engage in commercial activities with respect to horsemeat for human consumption); Tex. Agric. Code § 149-001-007 (bans use of horsemeat for human consumption); 225 Ill. Comp. Stat. 635/1.5 (unlawful to slaughter horses for human consumption and to trade in horsemeat).

The California legislature responded by enacting Section 599f based on its judgment that additional protections should be afforded to nonambulatory animals. Section 599f focuses humane attention on animals who are already in a severe state of suffering that the state believes should be relieved. The law was amended because of indisputable evidence that these animals are especially vulnerable to mistreatment that existing law had not sufficiently addressed. Section 599f prohibits, *inter alia,* the slaughter of nonambulatory animals for human consumption, the sale, purchase, or receipt of nonambulatory animals, and the holding of a nonambulatory animal at a slaughterhouse without taking immediate steps to humanely euthanize the animals. Cal. Penal Code § 599f(a), (b), (c).[29]

A. The FMIA's Congressional Purpose is to Safeguard the Food Supply, Not to Ensure Humane Care of Animals

In marked contrast to the animal welfare purpose of Section 599f, the FMIA and regulations promulgated under it are aimed primarily at ensuring the safety of the human food supply, specifically the safety of meat derived from animals who are slaughtered for human consumption. The Congressional

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[29] "Nonambulatory" means "unable to stand and walk without assistance." *Id.* § 599f(j). Petitioner's claims relate only to Cal. Penal Code §§ 599(a), (b) and (c).

purpose as articulated in the Act states in relevant part that "it is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated and properly marked, labeled and packaged." 21 U.S.C. § 602. To that end, the FMIA and its regulations (embodied in 9 C.F.R. § 300 *et. seq.*) govern the inspection of all "amenable species"[30] offered for slaughter at federally regulated slaughterhouses, inspection of the meat products derived from that slaughter, handling of animals offered for slaughter while on slaughterhouse premises, marking and labeling of meat products and all recordkeeping necessitated by those processes. 21 U.S.C. §§ 601 *et seq.*, 9 C.F.R. §§ 300 *et seq.*

Nothing contained in the FMIA or its regulations dictates that federally regulated slaughterhouses must accept *any* animal for slaughter. Rather, consonant with its Congressional purpose, the Act is focused on processes that will ensure the safety of meat that is in fact produced at these facilities, from animals that are indeed slaughtered. Therefore, the area in which Section 599f legislates (deciding, for humane reasons, that certain identifiable animals should not be slaughtered for human consumption in California) is entirely distinct from the area with which the

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[30] "Amenable species" are defined as "those species subject to the provisions of th[e FMIA] . . . and any additional species that the Secretary considers appropriate." 21 U.S.C. § 601(w).

FMIA is concerned (inspection and recordkeeping, to ensure meat safety, with regard to animals that are in fact slaughtered for human consumption).

The FMIA's preemption language does nothing to alter this conclusion and indeed supports Respondents' position that the FMIA does not preempt Section 599f. In relevant part, 21 U.S.C. § 678 states:

> Requirements within the scope of this chapter with respect to premises, facilities and operations . . . which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia. . . .

This provision delineates a narrow reach of federal preemption, specifically activities that are within the limited "scope" of the FMIA and that are directly related to the operation of slaughterhouses pertaining to the production of safe food products. Section 678 also expressly reserves to the states a wide swath of regulatory power in matters that are tangential to the actual process of slaughter itself. "This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter." *Id.*

While Congress and federal agencies can of course preempt state law, there is "a strong presumption against preemption, especially when the state law deals with matters like health and animal welfare which have historically been regulated by states."

Nat'l Meat Ass'n v. Brown, 599 F.3d 1093, 1097 (9th Cir. 2010), *cert. granted,* 131 S. Ct. 3083 (2011). *See also Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 n.3 (2009) (state tort claim against drug manufacturer for failing to provide sufficient label warning was not preempted by the Federal Food, Drug, and Cosmetic Act where it was possible to comply with both state and federal law). Great deference is granted where the area of state legislation is within its historic police powers, the assumption being that state laws are not to be superseded by federal law unless that was the clear and manifest purpose of Congress. *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 528 F. Supp. 2d 62 (N.D.N.Y. 2007).

Whether or not the presumption against preemption applies in this case matters little to the result, since the proper "understanding of the scope of a preemption statute must [nonetheless] rest primarily on a 'fair understanding of congressional purpose'" in enacting the federal law. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) *quoting Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530 n.27 (1992) (opinion of Stevens, J.). The only "fair understanding" of the Congressional purpose underlying the FMIA is that it is intended to safeguard the food supply by regulating the inspection of animals slaughtered for food and the resulting meat products derived from that slaughter. Neither the statement of Congressional purpose nor the letter of the law itself evidence an intent to regulate matters that are unrelated to the inspection and slaughter of animals in federal facilities and the

labeling of resulting meat products. When a state makes a moral judgment based on animal welfare considerations that its citizens wish to remove a specific type of animal from the meat production process, whether it makes that decision for an entire species or for animals that occupy other distinct categories such as those that cannot stand and walk, that decision is well outside the Congressional intent of FMIA and therefore not preempted by federal law.

The Ninth Circuit correctly observed that:

> States aren't limited to excluding animals from slaughter on a species wide basis. . . . Regulating what kinds of animals may be slaughtered calls for a host of practical, moral and public health judgments that go far beyond those made in the FMIA. These are the kinds of judgments reserved to the states, and nothing in the FMIA requires states to make them on a species-wide basis or not at all. Federal law regulates the meat inspection process; states are free to decide which animals will be turned into meat.

Nat'l Meat Ass'n, at 1098-99. Therefore, the court continued, Section 599f does not regulate the "premises, facilities and operations" of slaughterhouses within the scope of the FMIA.

The Ninth Circuit correctly noted that the case at bar is similar to the two circuit court cases that address the same FMIA preemption language in the context of Texas and Illinois statutes banning the slaughter of horses for human consumption. In

Empacadora de Carnes de Fresnillo v. Curry, the Fifth Circuit held that Texas Agriculture Code Chapter 149 did not seek to regulate the "premises, facilities and operations" of federally regulated slaughterhouses. 476 F.3d 326 (5th Cir. 2007), *cert. denied*, 550 U.S. 957 (2007). Rather, the court ruled that the narrow FMIA preemption language "limits states in their ability to govern meat inspection and labeling requirements. It in no way limits states in their ability to regulate what type of meat may be sold for human consumption in the first place." *Id.* The FMIA preemption language "is more naturally read as being concerned with the methods, standards of quality, and packaging that slaughterhouses use, matters that [the Texas horsemeat ban] is entirely unconcerned with." *Id.* The "FMIA does not expressly dispose states of their ability to define what meats may be available for slaughter and human consumption." *Id.*

The Seventh Circuit reached the same conclusion, rejecting the argument that the FMIA preempted the Illinois Horse Meat Act (which bans slaughter of horses for human consumption), and concluding that if a state allows horsemeat to be produced for human consumption, the FMIA would control the inspection and recordkeeping process of that production. If, however, production of horsemeat for human consumption is prohibited, "there is nothing so far as horsemeat is concerned, for the Act to work upon." *Cavel v. Madigan*, 500 F.3d 551, 554 (7th Cir. 2007), *cert. denied*, 554 U.S. 902 (2008).

B. Section 599f Governs Only Humane Treatment of Animals in California and Does Not Regulate Slaughterhouse Functions

In determining that the treatment of nonambulatory animals headed for slaughter is cruel, and by requiring humane treatment of those animals and prohibiting the slaughter of nonambulatory animals for human consumption, Section 599f is no different than any other anti-cruelty law that restricts or prohibits abusive behavior because it runs counter to prevailing community norms. Section 599f seeks to prevent the considerable suffering inflicted when animals that are too sick or disabled to stand and walk to their death, are compelled to do so through a variety of inhumane means. By making sale of meat from downed animals illegal as well, Section 599f further affirms the moral judgment that the production of meat from these animals contains a potential for animal cruelty that the State of California has decided is unacceptable. As an anti-cruelty law with an intent, purpose and effect entirely distinct from those of the FMIA, Section 599f does not tread on the scope of the FMIA and is not preempted by that Act.

Since there is no comprehensive federal law protecting livestock from cruel and inhumane treatment,[31]

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[31] The Animal Welfare Act (AWA) expressly exempts livestock from its coverage. 7 U.S.C. § 2132(s). Other federal laws provide very limited legal protection for livestock in transit or at the slaughterhouse, regulate only small, discrete parts of

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safeguards against animal abuse are derived principally from state anti-cruelty laws, which as discussed *supra* have evolved to encompass humane livestock treatment provisions. The State of California amended its anti-cruelty law to address the treatment of nonambulatory animals based on the same humane concerns and authority upon which the rest of its anti-cruelty laws are premised. When it comes to mistreatment of nonambulatory animals at slaughter facilities, the abuse is gruesome and well documented. The Food Safety and Inspection Service ("FSIS"), the agency responsible for slaughterhouse inspections, has issued a series of noncompliance reports that illustrate a shocking array of abusive behaviors at all phases of the process involving nonambulatory animals at slaughter facilities, from unloading upon arrival until the debilitated animals are forced through a real-life shop of horrors to the slaughter floor.[22]

In the spirit of anti-cruelty laws that came before it Section 599f seeks to prevent this sort of horrific cruelty from being inflicted on nonambulatory animals. It does this by removing them from the slaughter process entirely and by making sale of their meat likewise illegal.

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the overall slaughter process, and do not directly address the humane concerns of Section 599f. *See, e.g.*, 49 U.S.C. § 80502 (animals transported interstate cannot be confined for more than 28 consecutive hours without being unloaded for food, water and rest); 7 U.S.C. §§ 1901-07 (addressing treatment of animals "in connection with slaughter").

[22] *See* Brief for the Non-State Respondents at 11-14.

Section 599f, like the myriad other state anti-cruelty provisions which regulate a vast array of behaviors to protect animals of every species and physical condition, is a legitimate exercise of state police power aimed at putting an end to cruel treatment of nonambulatory animals in the state of California. Like the Texas and Illinois horse slaughter bans, it does not regulate, within the "scope" of the FMIA, the "premises, facilities and operations" of slaughterhouses and therefore it is not "different than or in addition to" the FMIA. Section 599f merely invokes California's right to determine what kind of treatment of animals will be tolerated within its borders, and by so doing it is entirely outside the purview of the FMIA.

The provisions of the Humane Methods of Slaughter Act (HMSA), 7 U.S.C. §§ 1901-07, do not alter this conclusion, despite the FMIA's reference to the HMSA's humane handling provisions. Enacted in 1958 at the behest of human organizations, and amended in 1978 to provide somewhat broader coverage, the HMSA establishes minimum standards for the humane treatment of animals that will ultimately be slaughtered for human consumption. A number of factors indicate that Congress never intended to have the HMSA or the FMIA usurp the states' rights to legislate animal cruelty, even with regard to animals who might come under the purview of those laws. First, unlike the FMIA, the HMSA does not contain any preemption language, and there is no evidence of legislative intent to replace state level anti-cruelty

laws governing humane treatment of livestock. Second, the legislative record with respect to the HMSA indicates that Congress was well aware of the long history of state regulation in the area of animal welfare and "recognized the difficulties and the problem of constitutionality involved in a criminal statute asserting federal jurisdiction in an area where the States not only have the authority to act but where they have exercised that authority." H.R. Rep. No. 85-706 at 131. By that statement, Congress acknowledged what *amicus* has established *supra* – that absent extremely compelling and unambiguous language, the HMSA (and its FMIA references) expressly preserved California's right to enact an anti-cruelty law like Section 599f. Third, the HMSA and FMIA are two separate federal acts, and the HMSA is notably not incorporated by reference into the FMIA. Nor does the FMIA's preemption clause address HMSA principles – only the scope of the FMIA, which all agree is the production of safe meat for the consumer. The absence of clear Congressional intent to usurp states' power to decide how animals should be treated in their jurisdictions, the lack of any textual indication that the HMSA has any preemptive force, and the strong presumption against preemption where such intrinsic police powers are at stake, establish that Section 599f is a legitimate component of California's anti-cruelty law and does not run afoul of the HMSA or the FMIA's humane handling references.

Other arguments pressed by Petitioner are more fully addressed in Respondents' briefs but merit some

attention in the context of *amicus'* role, of informing the Court of traditional animal welfare considerations. Like the HMSA, the underlying purpose of FMIA is in no way compromised or undermined by Section 599f's standard approach to legislating against cruelty within the state. It does not alter existing safeguards with respect to ante and post mortem inspection of animals that are to be slaughtered. It merely protects an easily identified class of animals and takes them out of the inspection process altogether. Animals that can legally be slaughtered in California will continue to be subject to the full panoply of inspections dictated by FMIA and attendant regulations, and Section 599f in no way interfers with those processes. That the "type" of animal here is a nonambulatory animal rather than a discrete species is also of no moment since as discussed previously, there is nothing in existing law that draws such an artificial limitation on a state's authority to exercise its police power in crafting its anti-cruelty laws.

Nor does Section 599f(c) directly conflict with the FMIA provisions governing euthanasia of nonambulatory animals since that section requires immediate euthanasia and the FMIA permits segregation and reinspection after a "rest period." But the euthanasia provision in Section 599f applies only in the anti-cruelty context, and only to the unquantified and minute percentage of animals that become nonambulatory after they have entered the slaughterhouse. It remains within California's jurisdiction to determine that such animals, because of the potential for pain

and suffering they might experience, cannot be slaughtered within the state. At that point, they are no longer animals that are subject to the FMIA because they cannot be slaughtered in California.

CONCLUSION

Section 599f is at the very heart and purpose of state anti-cruelty laws, and nothing in the law falls within the scope of the FMIA or interferes with the business of meat production.

The Ninth Circuit decision vacating the preliminary injunction should therefore be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 10-224

In The
SUPREME COURT OF THE UNITED STATES

NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

KAMALA D. HARRIS, *et al.*,

Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For the Ninth Circuit

BRIEF OF *AMICI CURIAE* TIM BLACKWELL, D.V.M. and KRISTIE MOZZACHIO, D.V.M. IN SUPPORT OF RESPONDENTS

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I. INTEREST OF THE *AMICI CURIAE*

Tim Blackwell, D.V.M. and Kristie Mozzachio, D.V.M. submit this brief as *amici curiae* in support of the Respondents.[1]

Dr. Blackwell has over thirty-three years of veterinary medicine experience with an expertise in swine health, an area in which he obtained a Doctor of Philosophy degree from the University of Minnesota. He has been on the faculty and taught courses at the University of Minnesota and Ontario Veterinary College. Dr. Blackwell is currently a veterinary scientist for the Ontario Ministry of Agriculture and Food. He has published and presented many articles and papers and is a member of a number of professional veterinary organizations including the American Association of Swine Veterinarians and the Ontario Association of Swine Practitioners. Dr. Mozzachio is a certified veterinary pathologist with specific expertise in swine diseases. She has a veterinary practice devoted exclusively to the care of pigs, is an adjunct faculty member of North Carolina State University's Veterinary Teaching Hospital, and

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[1] Petitioner and Respondents have consented to the filing of this brief after receiving timely notice from the *amici curiae*. As required by SUP. CT. R. 37.6, Dr. Blackwell and Dr. Mozzachio state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

provides pathology-related consulting services to various laboratories in North Carolina.

As professional swine veterinarians, Dr. Blackwell and Dr. Mozzachio have an interest in the humane treatment of the animal species to which they have devoted their professional lives and in insuring that any decision rendered by the Court is based upon accurate and objective science. Through this *amicus curiae* brief, Dr. Blackwell and Dr. Mozzachio specifically seek to correct the erroneous claims relating to the human health and safety issues raised in the briefs of Petitioner and its *amici*. Given their particular knowledge, training, and expertise, Dr. Blackwell and Dr. Mozzachio are well positioned to explain why the implementation of California Penal Code Section 599f ("Section 599f") does not pose any risk to human health and safety and why its enforcement would encourage more humane treatment of pigs. Therefore, Dr. Blackwell and Dr. Mozzachio respectfully request that the Court affirm the judgment of the Court of Appeals.

II. SUMMARY OF ARGUMENT

The primary purpose of this *amicus* brief is to insure that the Court understands that Section 599f does not pose any risk to human health and thus does not interfere with what Petitioner refers to as the "one basic and fundamental objective" of the Federal Meat Inspection Act ("FMIA") — "to insure the wholesomeness and cleanliness of the entire meat supply in th[e] United States." Brief for Petitioner on Writ of Certiorari at 3-4, *Nat'l Meat Ass'n. v. Harris*,

No. 10-224 (9th Cir. Aug. 22, 2011) (quoting 113 CONG. REC. 30512 (1967) (statement of Rep. May)) ("Petitioner's Brief"). *Amici* also seek to inform the Court that the immediate euthanization of non-ambulatory pigs required by Section 599f will in fact encourage more humane treatment of swine before they ever reach the premises of a slaughterhouse.

III. EUTHANIZING DOWNED PIGS BEFORE THEY ARE OFFERED FOR SLAUGHTER DOES NOT THREATEN PUBLIC HEALTH IN THE SLIGHTEST AND THUS DOES NOT INTERFERE WITH THE POLICY UNDERLYING THE FEDERAL MEAT INSPECTION ACT

A. The Purpose of The FMIA Is To Protect Public Health, Not Industry Profits

There can be no doubt that the FMIA was enacted "to prevent the shipment of impure, unwholesome and unfit meat and meat food products in interstate and foreign commerce." *Pittsburgh Melting Co. v. Totten*, 248 U.S. 1, 4-5 (1918). Indeed, Petitioner accurately reports not only the impetus for the first Meat Inspection Act as the response to concerns over unhealthful meat created by publication of *The Jungle*, but also that the comprehensive set of regulations promulgated to implement the FMIA was for the purpose of preventing the use in commerce of meat and meat food products which are adulterated. Petitioner's Brief at 41.

Significantly, the FMIA was not enacted to protect profits when methods of production become, in the judgment of a State, inhumane. Instead, its purpose, and accordingly the animating rationale for its preemptive scope, are the protection of public health. *United States v. Stanko*, 491 F.3d 408, 417 (8th Cir. 2007) ("[D]espite the fact that the FMIA statutory scheme necessarily involves regulating business and may have the effect of protecting consumers and competition from economic harm, we conclude that the primary purpose of the FMIA is to protect public health from the effects of unwholesome meat."); *Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003) ("[T]he very purpose of the FMIA and FFDCA...is to ensure the safety of the nation's food supply and minimize the risk to public health from potentially dangerous food and drug products."); *United States v. Mullens*, 583 F.2d 134, 139 (5th Cir. 1978) ("The purpose of the Meat Inspection Act of 1907, as amended, of which the present section 622 is a part, is to ensure a high level of cleanliness and safety in meat products."); *G.A. Portello & Co., Inc. v. Butz*, 345 F. Supp. 1204, 1207-08 (D.D.C. 1972) ("It is clear...that the policy of the [Federal Meat Inspection] Act and the regulations is above all to protect the health and welfare of consumers.").[2]

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[2] The other purpose of the FMIA, as amended by the Humane Methods of Slaughter Act of 1978, cited by Petitioner, is to ensure that all livestock offered for slaughter are handled and killed humanely. However, there can be no plausible claim that Section 599f's requirement of immediate euthanization (the most humane treatment conceivable for a non-ambulatory

(Continued)

B. The Implication of Petitioner And Its *Amici* That Human Health Is Jeopardized By Penal Code Section 599f Is False

The briefs of Petitioner and its *amici* contain repeated innuendoes, completely unsupported by any evidence or scientific sources, that Section 599f's requirement of immediate euthanization threatens human or "public health" by supposedly interfering with the implementation of federal regulations requiring ante-mortem inspection of slaughterhouse animals. Petitioner's brief uses the phrase "human health," albeit for the first and last time, in a context that implies that Section 599f's alleged interference with ante-mortem inspection undermines the protection of human health. Petitioner's Brief at 14. Of course, that assertion is not accompanied by any citation to evidence in the record or scientific support. Petitioner also claims, somewhat more ambiguously, that any delay in the detection of vesicular diseases like foot-and-mouth disease ("FMD") "can be devastating." *Id.* at 13. But while Petitioner does not identify what kind of "devastation" it is referring to in this context, it is important to understand that it is decidedly not a human health issue. Indeed, Petitioner's supporting reference for its assertion is to an article, revealingly entitled, "Economic Impacts of Foreign

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(Continued)

animal otherwise destined for the slaughter line) undermines or threatens the humane handling purpose of the FMIA.

Animal Disease." *Id.* (citing Philip L. Paarlberg, *et al.*, *Economic Impacts of Foreign Animal Disease*, USDA Economic Research Report Number 57 (May 2008), *available at* http://www.ers.usda.gov /Publications/ERR57/ERR57.pdf).

Although the joint brief of the three pork industry groups The National Pork Producers Council, The National Farmers Union, and the American Association of Swine Veterinarians (the "Industry *Amici*") is far less ambiguous and far less restrained in its intimations about the supposed human health risks at issue, its assertions are equally unsupported. The Industry *Amici* work from the premise that "[a]nte-mortem inspection is particularly critical as a front-line defense against the spread of Classical Swine Fever (hog cholera) and Foot & Mouth Disease (a type of vesicular disease)." Brief of the Am. Ass'n. of Swine Veterinarians, *et al.* as *Amici Curiae* in Support of Pet'r and for Reversal of the Ninth Circuit's Judgment at 7, *Nat'l Meat Ass'n. v. Harris*, No. 10-224 (9th Cir. Aug. 29, 2011) ("Industry *Amici* Brief"). Thus, preventing ante-mortem inspection by euthanizing a downed pig, the Industry *Amici* imply, will harm public health. For instance, the Industry *Amici* assert that the Ninth Circuit's decision and Section 599f "endanger[ ] public health" (*Id.* at 3), "will have a potentially devastating impact on animal health and public health" (*Id.* at 6), "tie[ ] the hands of federal veterinarians...in fighting the spread of dangerous illnesses among swine (and potentially humans)," and "place[ ] the health of both swine and humans at unnecessary risk." *Id.* at 12.

Notably, however, the Industry *Amici*, which include a trade association of pork industry veterinarians, fails to cite to literally anything, much less any science, to support any of its hyperbolic warnings about human health.

Even assuming that the federal regulations concerning ante-mortem inspection apply to animals euthanized and thus taken out of the food supply **before** they are offered for slaughter, the fact is that ante-mortem inspection of those downed animals suffering from FMD or hog cholera does **nothing** to protect or advance human health. Whatever the harms associated with those diseases, none include any threat to human health. Neither FMD nor hog cholera are zoonotic. In other words, these diseases cannot be transmitted to, or caught by, humans. Notwithstanding the absence of authority on the subject in the briefs of Petitioner and its *amici*, it is well recognized that FMD is not zoonotic. B.E. Straw *et al.*, *Diseases of Swine* 519 (9th ed. 2006) ("Diseases of Swine") ("FMD viruses should not be considered zoonotic (citation omitted)."). The United Stated Department of Agriculture agrees that FMD poses no risk to human health. Animal and Plant Health Inspection Service, USDA, *Fact Sheet: Foot-and-Mouth Disease* (Feb. 2007), *available at* http://www.aphis.usda.gov/publications/animal_health/content/printable_version/fs_foot_mouth_disease07.pdf ("FMD is not recognized as a zoonotic disease."). Similarly, hog cholera (also known as Classical Swine Fever or "CSF") does not cause illness in humans. *See e.g.*, APHIS, USDA, *Classical Swine Fever: Still a Threat* (Sept. 1999), *available at:* http:

//www.aphis.usda.gov/publications/animal_health/content/printable_version/csflead.pdf. ("CSF does not cause illness in people").

Thus, notwithstanding their alarmist language, the exhortations of Petitioner and its *amici* that the Court must reverse the Ninth Circuit to avoid a potential public health catastrophe are entirely without basis and extremely misleading. There simply is no adverse public health issue implicated by Section 599f's requirement of immediate euthanization and the consequent removal of downed pigs from the food supply.

In any event, even as a means for advancing the industry's own (non-public health) objectives for seeking early detection of FMD and hog cholera, the claimed efficacy of ante-mortem inspection of non-ambulatory swine to detect these diseases is a medical *non sequitur*. In its brief in support of *certiorari*, the Industry *Amici* stated that information derived from ante-mortem inspection "can only be determined by viewing the animal in **motion** during the ante-mortem inspection." Motion for Leave to File Brief as *Amici Curiae* and Brief of the American Association of Swine Veterinarians and the National Pork Producers Council as *Amici Curiae* in Support of Petition for Writ of Certiorari at 6, *Nat'l Meat Ass'n. v. Brown*, No. 10-224 (9th Cir. Sept. 10, 2010) ("Industry Brief (Cert.)"). In belated recognition of the implausibility of arguing that a non-ambulatory animal can be observed in motion, the Industry *Amici* have amended that sentence in their brief on the merits to state that such

information "can be determined only by viewing the animal while it is still alive." Industry *Amici* Brief at 8. But simply changing the words "in motion" to "while it is still alive" does not remedy the illogic of the position. Rather than cite any scientific or other evidence for this new position, the Industry *Amici* simply drop a footnote with the *ipse dixit* assertion that downed pigs can demonstrate sufficient "motion" for ante-mortem inspection while lying down. *Id.* at 8, n. 3. But even the FSIS Manual relied upon by the Industry *Amici* (which focuses on the observation of "lameness or limping", "stiffness", "stagger[ing] or circl[ing]", "run[ning] into things", "abnormal gaits", and "abnormal positions") belies the notion that any meaningful diagnostic information can be gleaned from observing a pig that is lying down.

Moreover, even as to ambulatory swine, there would be little to be gained from a diagnostic perspective by observing pigs walk which have either hog cholera or FMD. The clinical signs of hog cholera are non-specific and only post-mortem lesions and virus identification are diagnostic. *Diseases of Swine* at 316 ("Because there are no pathognomonic clinical signs in CSF, laboratory diagnosis is always required for confirmation."). As for FMD, the necessary diagnostic identification of often small blisters between the hooves of the infected animal, which remain visible for many hours after death, is far easier post-mortem. In any event, a laboratory analysis of samples is also necessary to confirm a FMD diagnosis. *Diseases of Swine* at 523.

C. Protecting The Profitability of Slaughterhouse Operations, As Opposed to Public Health, Does Not Justify Preemption of Section 599f

Petitioner ultimately admits its real concern with Section 599f is economics, not public welfare. Petitioner's Brief at 50 ("California's ban on sales was expressly intended to regulate slaughterhouse operations through economic pressure."). The Industry *Amici*, while cloaking themselves first and foremost as protectors of the public from a non-existent health risk, are far less shy about the real ax they have brought to grind. They devote the entire last section of their brief to industry harm, arguing that the "immediate euthanization mandate requires the pork industry to needlessly cull healthy animals from the herd" (Industry *Amici* Brief at 18), and thus: "[t]he California law threatens to make raising pigs economically unviable." *Id.* at 20.

Notwithstanding the concern of Petitioner and its industry allies with the profitability of the meat business, Section 599f's alleged interference with that economic interest has no place in this Court's decision whether Congress ever intended that the FMIA preempt it. The question is whether Section 599f interferes with the specific federal interest actually advanced by the statute. After all, the Court's "task is 'to determine whether under the circumstances of this particular case, (the State's) law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67, 61

S. Ct. 399, 404, 85 L.Ed. 581 (1941)." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977). As shown above, Section 599f simply has no adverse effect on the public health and welfare interests that the FMIA was enacted to protect

Rather than interfere with the actual purpose of the FMIA, Section 599f simply constitutes an exercise of a State's traditional police power to establish minimal standards for appropriate treatment of animals based on a moral and ethical concerns. *See e.g., C.E. Am., Inc. v. Antinori*, 210 So. 2d 443, 444 (Fla. 1968) ("[I]t is now generally recognized that legislation which has for its purpose the protection of animals from harassment and ill-treatment is a valid exercise of the police power." (citing 4 Am.Jur.2d Animals, Sec. 27)); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation." (citations omitted)); *see also, United States v. Stevens*, 130 S.Ct. 1577, 1583 (2010) (all 50 states and the District of Columbia have enacted animal cruelty laws); *United States v. Lopez*, 514 U.S. 549, 585 (1994) (Thomas, J., concurring) (noting that regulation of animal cruelty properly left to the individual States).

Given the well established cornerstones of the Court's pre-emption jurisprudence, there is no basis for upsetting California's exercise of its traditional police powers as manifested by Section 599f unless that statute intrudes upon the purpose of the federal

act at issue. *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187, 1194-95 (2009) ("'the purpose of Congress is the ultimate touchstone in every pre-emption case'" (citations omitted) and "we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" [citations omitted]).

Thus, in *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litigation*, 621 F.3d 781 (8th Cir. 2010), the Court of Appeals remarked that prosecution for abuse of a farmer's livestock under a state anti-cruelty statute would not be preempted by the Organic Foods Production Act of 1990 (the "OFPA"). The OFPA had established national standards for the sale and labeling of organically produced agricultural products, and created a certification program through which agricultural producers may become certified to produce organic products. *Id.* at 787. As the Eighth Circuit properly reasoned, "[p]reempting state law claims unrelated to the decision to certify, and certification compliance, does not advance the purpose of establishing national standards for organic foods." *Id.* at 798. The same reasoning applies here. Preempting a state law that necessarily removes non-ambulatory swine from the food supply by requiring their immediate euthanization for humanitarian reasons does nothing to advance (or undermine) the purpose of insuring wholesome and clean meat in the United States.

Because it is undisputed that Congress' purpose in enacting the FMIA was to protect the

health and welfare of the consuming public and because Section 599f's immediate euthanization requirement does not threaten public health or welfare in the slightest, a finding of pre-emption in this case could not be properly based on any claim that such a finding is necessary to implement the intention of Congress.

IV. EUTHANIZING DOWNED PIGS BEFORE THEY ARE OFFERED FOR SLAUGHTER ENCOURAGES MORE HUMANE TREATMENT OF THOSE ANIMALS DELIVERED TO CALIFORNIA SLAUGHTERHOUSES

The loss of pigs during transport to slaughterhouses has been a long standing and worsening problem in the swine industry. In 1933, as reported by the National Livestock Loss Prevention Board, which was developed to monitor such losses, .08% of pigs delivered to processing plants died during transport. M.J. Ritter, *et al.*, *Review: Transport Losses in Market Weight Pigs: I. A Review of Definitions, Incidence, and Economic Impact*, 25 THE PROF. ANIMAL SCIENTIST 404, 405 (2009). In 2006, that percentage had almost tripled to .22%, which translates to 228,114 pigs given the number of pigs slaughtered that year. A similar problem in pigs becoming non-ambulatory during transport to slaughter has existed and also worsened over the same time frame. In 1933, the reported figure was .16%, and by 2006, that figure had grown to .44% which, in that year, represented 456,228 pigs. There is no dispute about this phenomenon. Petitioner itself

acknowledges that "hogs can become nonambulatory during transit." Petitioner's Brief at 46.

The causes of this problem have been the subject of extensive industry study and have led to a number of recommendations for decreasing the levels of death and fatigue or injury associated with a non-ambulatory condition. M.J. Ritter, *et al.*, *Effect of Floor Space During Transport of Market-Weight Pigs on the Incidence of Transport Losses at the Packing Plant and The Relationship Between Transport Conditions and Losses*, 84 J. ANIMAL SCI. 2856, 2856-2864 (2006) ("Ritter"); John McGlone, *Fatigued Pigs: The Transportation Link*, PORK MAG., February 1, 2006 ("McGlone"); Charles Haley, *et al.*, *Association Between In-Transit Loss, Internal Trailer Temperature and Distance Traveled by Ontario Market Hogs*, 72 THE CAN. J. OF VETERINARY RES. 385, 385-389 (2008) ("Haley"). Recommendations designed to lower stress levels and minimize other injurious conditions experienced during transport include: use of monitoring and cooling systems to lower internal trailer temperatures (Haley, *supra* at 387), avoiding unnecessary stops and keeping transport trucks moving or using fans (McGlone, *supra*), using proper bedding to prevent slipping and falling and to provide comfort in cold weather (McGlone, *supra*), and decreasing overcrowding on trucks (Ritter, *supra* at 2864).

Thus, the industry itself has established a correlation between providing humane treatment for pigs during transport and reducing the number of non-ambulatory pigs delivered to a slaughterhouse.

Section 599f's requirement of immediate euthanasia in advance of slaughter, eliminating all downed swine from the food supply and any economic benefit that might be derived from them, thus encourages the types of humane treatment recognized by the industry as effective in preventing pigs from experiencing the pain and suffering associated with becoming non-ambulatory in the first place. There is nothing in the purposes underlying the FMIA that would suggest any Congressional intent to preempt such a legislative initiative from a state.

V. CONCLUSION

Dr. Blackwell and Dr. Mozzachio respectfully submit that the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-224

In the Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,

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KAMALA D. HARRIS *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

This is one such case. The Chamber—which has filed amicus briefs in prior preemption cases, including *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011), *Williamson* v. *Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011), *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct. 1068 (2011), *Wyeth* v. *Levine*, 555 U.S. 555 (2009), *Altria Group, Inc.* v. *Good*, 555 U.S. 70 (2008), *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312 (2008), *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861 (2000),

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no party, counsel for a party, or any person other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Letters reflecting the parties' consent to the filing of the brief have been filed with the Clerk.

and *United States* v. *Locke*, 529 U.S. 89 (2000)—is well-situated to address the issue of preemption raised here. Its members—which include meat processors and packers that depend on preemption under the Federal Meat Inspection Act (FMIA or Act), 21 U.S.C. § 678—are engaged in commerce in each of the 50 states. The Chamber's membership includes businesses that are subject in varying degrees to a wide range of federal regulatory schemes that expressly preempt state and local laws. As a result, the Chamber is uniquely suited to offer a broader perspective on preemption and keenly interested in ensuring that the regulatory environment in which its members operate is a consistent one.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FMIA's express preemption provision straightforwardly provides that no State may impose "[r]equirements within the scope of [the Act] with respect to premises, facilities and operations of any [federally inspected] establishment * * * , which are in addition to, or different than those" established by the federal government. 21 U.S.C. § 678.

Petitioner challenges a California statute that makes it illegal for a federally inspected slaughterhouse to, *inter alia*, "receive," "hold," "butcher," or otherwise "process" non-ambulatory swine. Cal. Penal Code § 599f. In effect, State law requires the immediate euthanasia and disposal of non-ambulatory swine as soon as they are discovered. Yet federal law imposes no such requirement. Rather, it contemplates the ante-mortem observation and inspection of non-ambulatory swine, which allows inspectors under the auspices of USDA's Food Safety and Inspection Service (FSIS) to determine if the affected ani-

mal has a communicable disease that might affect a larger population.

The court of appeals, conceiving itself bound by the "presumption against preemption" to give the FMIA's preemption provision "a narrow interpretation," concluded that the California statute was not preempted. Pet. App. 7a-8a. Petitioner's brief explains in detail why the decision below is incorrect. Rather than reprising at length the features of the statutory text and regulatory scheme that support petitioner's reading of the FMIA's preemptive scope, we focus on a problematic and more generally applicable aspect of the decision below, the court's use of a presumption against preemption. Although there is no basis for applying a presumption against preemption in any context, doing so is especially unwarranted when (as here) Congress has expressly stated its intent to preempt state law.

Particularly in the context of express preemption, the presumption against preemption is fundamentally at odds with central principles of preemption law and statutory interpretation. It cannot be reconciled with the settled understanding that preemption turns on congressional intent. A presumption that must yield to any indicia of Congress's preemptive purpose—as ascertained through the usual methods of statutory construction—has very limited application. Thus, one unsurprisingly finds that the Court often ignores the presumption or applies it to no discernable effect, suggesting that the presumption is of limited utility as a practical matter. Other courts struggling to apply this Court's jurisprudence have similarly encountered difficulties trying to make sense of the presumption and deciding how much weight to afford it. Because the pre-

sumption is logically ungrounded and has been applied in a haphazard fashion, this case presents an excellent opportunity to reexamine the applicability of the presumption and clarify that express preemption provisions should simply be given a fair reading, with a thumb neither on the side favoring preemption nor that disfavoring it.

The State respondents have asserted that the presumption against preemption is justified in order to protect the traditional prerogatives of the States. The threat to federalism they invoke is exaggerated, while the remedy they propose—the presumption against preemption—endangers other constitutional values. When Congress includes an express preemption clause in a statute (as it did in the FMIA), Congress's intent to displace state law is obvious and the only remaining issue is the *extent* of preemption intended. This is a straightforward issue of statutory interpretation, and does not implicate our system of federalism or the "respect for the States as independent sovereigns." Cf. State BIO 17 (internal quotation marks omitted).

In other words, whatever the force of the view that matters of federal law should *ordinarily* be approached with due regard for the States' traditional spheres of responsibility (*e.g.*, in matters of health or safety), once Congress has already *explicitly* stated its intent to preempt state law, the balance that Congress has articulated should not lightly be second-guessed by courts or disrupted by interpretive "presumptions." It is, after all, in the political branches that the Constitution has vested the prerogative of refining the balance between the respective roles of the States and of the Federal government. That is the unmistakable import of the Su-

premacy Clause, which declares Federal law the "supreme Law of the Land * * * any Thing in the * * * Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

Thus, application of a presumption against preemption has no legitimate purpose (if ever it does) once Congress has validly enacted a preemption provision pursuant to one of its enumerated powers—and nobody disputes that the FMIA's application to slaughterhouses that receive animals transported in interstate commerce and process them for interstate consumption falls squarely within the heartland of Congress's Commerce Clause power. When courts adopt "narrow" readings of statutory language in order to avoid finding preemption, they frustrate Congress's purpose in establishing a uniform federal regime to govern conduct—a congressional function that takes on additional importance when the alternative is a patchwork of inconsistent state regulation and, worse yet, frustration of important federal regulatory objectives.

This very case aptly illustrates the dangers of the systematic application of a presumption against preemption in express preemption cases. As the United States has persuasively explained, the California statute and the decision below are "misconceived" and "threaten[] to disrupt the * * * inspection activities" carried out by FSIS. U.S. Br. 20; see also Pet. Br. 30-33. Federal law provides for the systematic ante-mortem and post-mortem inspection of livestock. The federal scheme is designed not only to screen out individual animals that are unsuitable for human consumption but also to "implement a *national policy* of humane handling" and to ensure the rapid detection of communicable diseases that could

spread and "destabilize the *Nation's* meat supply." U.S. Br. 10 (emphasis added). Because California law requires the immediate euthanasia of non-ambulatory swine—*i.e.*, before the animal can be separated from the herd, held for disposition, and ultimately observed and inspected ante-mortem by federal inspectors—it disrupts the federal inspection regime and increases the risk that serious diseases could go undetected. The imposition of an alternative regime for processing non-ambulatory swine on the basis of one State's perception that the federal "USDA inspection system" is inadequate is precisely the sort of venturesomeness that the FMIA's express preemption provision was designed to curb. See CA9 App. 195.

Finally, the non-State respondents suggest that the presumption against preemption is justified as a sort of tiebreaker when the ordinary tools of statutory construction are in equipoise and the reading disfavoring preemption is truly "just as plausible" as the one favoring preemption. See *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); HSUS BIO 29-30. There is no principled basis for such a "tiebreaker," since there is nothing intrinsically suspect about preemption. In any event, that principle could have no application in *this* case. As petitioner explains, Congress's intent to preempt state-law requirements pertaining to the operation of federally inspected slaughterhouses—including any attempt to regulate the processing of animals once they have arrived within the premises—is plain on the face of the FMIA's express preemption provision, and is further confirmed by the FMIA's legislative history and the structure of the federal meat inspection regime. There is no countervailing reason to believe that Congress would have wanted to allow States to "fru-

strate FSIS's inspection activity * * * by requiring immediate euthanasia" before federally conducted "ante-mortem inspections" can be completed. U.S. Br. 21. This is an easy case—especially once the presumption against preemption has been laid to rest in the express preemption context.

ARGUMENT

Although the conclusion that California Penal Code § 599f is preempted follows whether or not the presumption against preemption is applied, the Court should take this opportunity to clarify that the presumption should have played no role in the analysis of the FMIA's express preemption provision.

In refusing to find that Section 599f of the California Penal Code is expressly preempted by the FMIA, the court of appeals manifestly erred. After all, as petitioner explains, California law plainly imposes "requirements" with respect to the "premises, facilities and operations" of federally inspected slaughterhouses that are "in addition to[] or different" from those provided for by federal law. Cf. 21 U.S.C. § 678. State law bans receiving, holding, butchering, or processing non-ambulatory swine and requires instead "immediate action to humanely euthanize the animal." Cal. Penal Code § 599f(c). Federal law imposes no such requirement. The FMIA's "explicit pre-emption provision" thus "dictates the result" in this case: preemption of the California statute. See *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 531 (1977).

Although the decision below is incorrect under any standard, we submit that the court of appeals may not have wandered so far astray had it not begun its analysis by declaring that courts must re-

solve cases like this one "consistent[ly] with the presumption against preemption," which it understood to require that any express preemption provision be given a "narrow interpretation." Pet. App. 7a-8a. The court of appeals fundamentally misread the FMIA, and the fact that it ill-advisedly invoked a presumption against preemption did not help matters.

I. A Presumption Against Preemption Is Not Appropriately Applied In Express Preemption Cases.

The application of the presumption against preemption has not been without controversy. A number of current members of the Court have explicitly rejected the presumption's applicability. Earlier this year, a plurality of the Court would have discarded the presumption against preemption altogether. See *PLIVA, Inc.* v. *Mensing*, 131 S. Ct. 2567, 2579-2580 (2011) (plurality op.).[2] The *Mensing* plurality explained that the "Supremacy Clause indicates that a court need look no further than the ordinary meanin[g] of federal law, and should not distort federal law to accommodate conflicting state law." *Id.* at 2580 (internal quotation marks omitted); see also, *e.g.*, *Altria Group*, 555 U.S. at 102 (Thomas, J., dissenting); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S.

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[2] It is especially telling that the Court disclaimed a presumption against preemption in *Mensing*, which involved implied preemption, a context in which the argument for a presumption is arguably stronger. Four members of the Court expressly criticized the presumption, stating that "courts should not strain to find ways to reconcile federal law with seemingly conflicting state law." *Id.* at 2580. Thus, even in the context of implied preemption, it now appears the presumption may no longer command a majority of the Court. That is *a fortiori* true here, when the statute includes an express preemption provision.

504, 544 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); see also *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004) (noting that "not all Members of this Court agree" on the "application" of the "presumption against pre-emption") (internal quotation marks omitted).

In some cases, the Court has applied the doctrine when interpreting express preemption provisions. See, *e.g.*, *Altria Group*, 555 U.S. at 77; *Bates*, 544 U.S. at 449; *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996); *Cipollone*, 505 U.S. at 518. But not a single one of the Court's express preemption decisions since 2008 has applied the presumption.[3]

It went unmentioned in any of the opinions in *Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968 (2011), which interpreted the Immigration Reform and Control Act's express preemption provision. Similarly, earlier this year in *Bruesewitz*, the Court considered the preemptive effect of the Vaccine Act's express preemption provision. Neither the majority opinion nor Justice Breyer's concurring opinion—both of which concluded that the Vaccine Act preempted all design-defect claims against manufacturers of covered vaccines—referenced the presumption against preemption, even though the dissent specifically invoked it to support its argument. Cf. 131 S. Ct. at 1096 n.15 (Sotomayor, J., dissenting).

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[3] Even before, the Court has often decided express preemption cases without applying the presumption. *E.g.*, *Riegel*, 552 U.S. at 330 (holding that the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act preempted the plaintiff's state-law claims without even mentioning the presumption against preemption); see also pages 13-14 & notes 6-9, *infra*.

Rather, the majority gave a disputed term in the preemption provision "its most plausible meaning using the traditional tools of statutory interpretation." *Id.* at 1082.

And in *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710 (2009), the Court, although reading the statute at issue as not preempting certain state activities, notably did not rely on any presumption against preemption. The majority did "not invoke[] the presumption against pre-emption," and thought it "unnecessary to do so in giving force to the plain terms" of the provision. 129 S. Ct. at 2720. Similarly, Justice Thomas's partial concurrence and partial dissent explained that there should never be a presumption against preemption in express preemption cases, where there "is conclusive evidence of intent to pre-empt in the express words of the statute itself." *Id.* at 2732 (internal quotation marks omitted).

This case presents an excellent opportunity for the Court to clarify its jurisprudence and resolve the confusion in the lower courts by concluding that the presumption against preemption has no application in the express preemption context.

A. The preemption conflicts with the tools of statutory construction ordinarily used to ascertain Congressional intent.

Applying the presumption in the presence of an express preemption provision conflicts with the central, universally acknowledged rule governing preemption cases: "[p]re-emption fundamentally is a question of congressional intent." *English* v. *Gen.*

Elec. Co., 496 U.S. 72, 78-79 (1990).[4] The "task of statutory construction must in the first instance focus on the plain wording of the [express preemption] clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 62-63 (2002) (internal quotation marks omitted); see also *Whiting*, 131 S. Ct. at 1977 ("When a federal law contains an express preemption clause, we focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.") (internal quotation marks omitted).

Thus, even decisions that have forcefully stated the presumption against preemption have gone on to recognize that the Court's "analysis of the scope of [a] statute's pre-emption is guided by [the] oft-repeated comment * * * that '[t]he purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Lohr*, 518 U.S. at 485 (quoting *Cipollone*, 505 U.S. at 516). "As a result, any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of congressional purpose.'" *Ibid.* (emphasis omitted); see also *New York State Conference of Blue Cross & Blue Shield, Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

When Congress has made its preemptive intent known through "explicit statutory language," the Court's task is "an easy one." *English*, 496 U.S. at 79.

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[4] See, *e.g.*, *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992) (plurality opinion); *Cipollone*, 505 U.S. at 545 (Scalia, J., concurring in the judgment in part and dissenting in part); *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 208 (1985); *Hillsborough Cnty.* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 714 (1985).

The Court's "ultimate task * * * is to determine whether state regulation is consistent with * * * the statute as a whole (*Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)), and Congress's "pre-emptive intent" may be expressed through the "statute's express language or through its structure and purpose" (*Altria Group*, 555 U.S. at 76). It is settled that "[i]f the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990) (internal quotation marks omitted). Thus, any presumption against preemption "dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself." *Cipollone*, 505 U.S. at 545 (Scalia, J., concurring in the judgment in part and dissenting in part). "Under the Supremacy Clause, * * * [the Court's] job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning." *Id.* at 544. The judicial task is to "determine which state-law claims [the statute] pre-empts, *without slanting the inquiry* in favor of either the Federal Government or the States." *Bates*, 544 U.S. at 457 (Thomas, J., concurring in the judgment in part and dissenting in part) (emphasis added).

Because it is fundamental that preemption turns on congressional intent—and because the Court conducts an inquiry into preemption by "begin[ning] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose" (*FMC Corp.*, 498 U.S. at 57 (internal quotation marks omitted))—any presumption regarding preemption must yield to the ordinary tools of statutory construction when Congress has enacted an ex-

press preemption provision. This analysis starts with the text of the statute, read (only if necessary) in light of the statute's structure, purpose, regulatory context, and legislative history, and leaves no place for the "unreasonabl[e] interpret[ation of] expressly pre-emptive federal laws in the name of" a supposed presumption against preemption. *Altria Group*, 555 U.S. at 102 (Thomas, J., dissenting).

B. The Court has inconsistently applied the presumption and, in more recent cases, has effectively abandoned it.

In light of the primacy of congressional intent, it is hard to discern what work the presumption actually does in practice. To be sure, there are a fair number of cases in which the Court has recited the familiar phrases acknowledging the presumption.[5] But there are numerous express preemption decisions—most recently *Whiting*, *Bruesewitz*, *Cuomo*, and *Riegel*—in which the Court has "said not a word about 'a presumption against . . . preemption, * * * that was to be applied to construction of the text [of such a provision]." *Cipollone*, 505 U.S. at 546 (Scalia, J., concurring in the judgment in part and dissenting in part).[6] In fact, the Court regularly has "refrained from invoking the presumption in the context of express pre-emption." *Altria Group*, 555 U.S. at 99

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[5] *E.g.*, *Altria Group*, 555 U.S. at 77; *Lohr*, 518 U.S. at 485; *New York State Conference of Blue Cross & Blue Shield Plans*, 514 U.S. at 655; *Cipollone*, 505 U.S. at 518; *English*, 496 U.S. at 79; *Hillsborough Cnty.*, 471 U.S. at 715.

[6] Justice Scalia cited *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) and *Norfolk & W. Ry.* v. *Am. Train Dispatchers Ass'n*, 499 U.S. 117 (1991).

(Thomas, J., dissenting).[7] This is true both in cases holding state laws not to be preempted,[8] and in those finding them to be preempted.[9] And even when the Court has acknowledged the presumption against preemption, it has applied the presumption inconsistently. Although the Court has held that the presumption is inapplicable "when the State regulates in an area where there has been a history of significant federal presence" (*Locke*, 529 U.S. at 108), at other times it has said that the presumption governs all federal legislation (*Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981)) or legislation that touches fields where there has been a "historic presence of state law" (*Levine*, 555 U.S. at 1195 n.3).

Because the Court's decisions have done little to clarify the question of what it means to interpret an express preemption provision narrowly, and when this must be done, it is unsurprising that confusion and inconsistency dominate other courts' attempts to apply the presumption against preemption. See *De-*

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[7] Justice Thomas cited *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Engine Mfrs. Ass'n*, 541 U.S. 246; *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Locke*, 529 U.S. 89; and *Geier*, 529 U.S. 861. There are many others. *E.g.*, *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995); *Am. Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995); *FMC Corp.*, 498 U.S. 52; *La. Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982); *Malone* v. *White Motor Corp.*, 435 U.S. 497 (1978).

[8] See, *e.g.*, *Whiting*, *supra*; *Freightliner Corp.*, *supra*; *La. Public Serv. Comm'n*, *supra*; *Malone*, *supra*.

[9] See, *e.g.*, *Bruesewitz*, *supra*; *Cuomo*, *supra*; *Riegel*, *supra*; *Rowe*, *supra*; *Engine Mfrs. Ass'n*, *supra*; *Buckman*, *supra*; *Locke*, *supra*; *Geier*, *supra*; *Am. Airlines*, *supra*; *FMC Corp.*, *supra*; *Capital Cities Cable*, *supra*; *Fid. Fed. Sav.*, *supra*.

mahy v. *Actavis, Inc.*, 593 F.3d 428, 434 (5th Cir. 2010) (noting "ongoing disagreement * * * as to if, when, and how this presumption applies), *rev'd sub nom*, 131 S. Ct. 2567 (2011); *Farina* v. *Nokia*, 578 F. Supp. 2d 740, 754-55 (E.D. Pa. 2008) (noting that "Supreme Court precedents have not been consistent" and that "[h]ow this presumption against preemption is to be applied" has varied widely depending on context), *aff'd*, 625 F.3d 97 (2010), *cert. pending*, 79 U.S.L.W. 3514 (Feb. 22, 2011).

The Court's 5-4 decision in *Altria Group* has not dispelled this confusion. Although the majority opinion stated in passing that the presumption against preemption applies to express as well as implied preemption analyses (555 U.S. at 77), the Court did not explain how that result could be reconciled with *Riegel*—which was also decided in 2008, but which interpreted the express preemption provision without reference to any presumption against preemption—or the widely accepted tenet that congressional intent is the ultimate touchstone of the preemption inquiry. Nor can *Altria Group* be reconciled with the Court's subsequent express preemption decisions that have not invoked a presumption against preemption. See *Whiting*, 131 S. Ct. at 1977 ("[W]e 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'"); *Bruesewitz*, 131 S. Ct. at 1082 ("We must make do with giving the term its most plausible meaning using the traditional tools of statutory interpretation."); *Cuomo*, 129 S. Ct. at 2720; *id.* at 2732 (Thomas, J., concurring in part and dissenting in part).

This complexity is needless and unwarranted. In the end, we are not aware of any decision in which

the Court found evidence of congressional intent that would have been held sufficient in other contexts, but was rejected because it did not overcome the presumption against preemption. For all of the controversy, the presumption seems to make little difference to how *this* Court decides express preemption cases. But *other* courts have to struggle with faithfully applying this Court's precedent. It is time to abandon the presumption against preemption—at the very least in the express preemption context—and to bring to an end the mischief it has occasioned. Express preemption provisions should be analyzed according to the normal tools of statutory interpretation.

II. The Federalism Concerns That Respondents Have Asserted In Passing Cannot Justify A Presumption Against Preemption.

The presumption against preemption often is said to rest on "principles of federalism and respect for state sovereignty." *Cipollone*, 505 U.S. at 533 (Blackmun, J., concurring in part and dissenting in part). The State respondents insist that the presumption against preemption has particular force when the "state law concerns traditional areas that come within the police power, such as health and safety laws." State BIO 17. This traditionally advanced rationale for the presumption—*i.e.*, that it is necessary to respect the States as "independent sovereigns in our federal system"—does not, however, withstand scrutiny. *Ibid.* And it certainly does not constitute a legitimate reason for imposing a "clear statement" limitation on the scope of express preemption provisions.

A. The Supremacy Clause is a complete response to respondents' asserted federalism concerns.

No federalism concerns inhere in the operation of express preemption provisions because preemption of state law is a necessary consequence of the constitutional plan—in particular, the interplay between Congress's legislative powers and the Supremacy Clause. See *New York* v. *United States*, 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."). Regardless of how "compelling" an interest a State has in preservation of its law, "under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law"—even one "clearly within a State's acknowledged power, which interferes with or is contrary to federal law"—"must yield." *Gade*, 505 U.S. at 108 (internal quotation marks omitted).

Valid federal legislation has the power to trump state law. U.S. CONST. art. VI, cl. 2. The Supremacy Clause's purpose was "to remedy one of the chief defects in the Articles of Confederation by instructing courts to resolve state-federal conflicts in favor of federal law." David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 402 (2004). There is no historical "support * * * for the conclusion that the [F]ramers intended any * * * presumption to be read into [the Supremacy Clause]." Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. DAVIS L. REV. 1, 30 (2001).[10] To the

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[10] The Court's earliest Supremacy Clause cases give no indication that any sort of presumption against preemption should

contrary, there is every reason to believe the Framers would have regarded the Supremacy Clause as rejecting "a general presumption that federal law does not contradict state law." Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 293 (2000). On its face, the phrase "any [state] law to the contrary notwithstanding" in the Supremacy Clause is a "classic *non obstante* provision," which instructs courts *not* to apply the presumption against implied repeals. *Id.* at 238-240 & nn.43-45 (internal quotation marks omitted).

In other words, the Supremacy Clause was "designed precisely to eliminate any residual presumption" against implied repeals of state law in the face of conflicting federal law. Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 184. Thus, as the plurality explained in *Mensing*:

> The *non obstante* provision in the Supremacy Clause therefore suggests that federal law should be understood to impliedly repeal conflicting state law. [¶] Further, the provision suggests that courts should not strain to find ways to reconcile federal law with seemingly conflicting state law.

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govern analysis of the validity of state laws. See, *e.g.*, *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 343-344 (1816); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796) (applying no presumption in case where state criminal law was superseded by treaty). Nor did the Court in these early cases suggest that special treatment was appropriate for state laws involving exercise of the State's traditional police powers. Chief Justice Marshall took pains to explain for the Court that, if a State's laws "come into collision" with federal law by "being contrary to" acts of Congress, it would be immaterial that the laws were passed "in virtue of a power to regulate [the State's] domestic trade and police." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824).

131 S. Ct. at 2580. In sum, then, "the *non obstante* provision of the Supremacy Clause indicates that a court need look no further than 'the ordinary meaning[]' of federal law, and should not distort federal law to accommodate conflicting state law." *Id.* at 2580 (quoting *Levine*, 555 U.S. at 588 (Thomas, J., concurring in judgment)).

When all is said and done, the issue of constitutional magnitude implicated by the presumption against preemption is not the *vertical* structure of federal-state relations upon which petitioners and their *amici* dwell. After all, "'[t]he relative importance to the State of its own law is not material when there is a conflict with valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)). And "to the extent that other federalism questions remain—the wisdom of national regulation, the balance between regulatory uniformity and policy innovations, *etc.*—those questions are, by constitutional design, to be *answered by Congress*." Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2092 (2000) (emphasis added).

Rather, the presumption against preemption aggrandizes the judicial branch over the political branches—a classic *horizontal* clash of authority. Courts depart from the proper judicial role when they apply the presumption against preemption at the expense of concrete indicia of congressional intent. The "systematic[] favor[ing]" of "one result over another" in analyzing preemption questions "risk[s] an illegitimate expansion of the judicial function" by "disrupt[ing] the constitutional division of power be-

tween federal and state governments" and by "rewrit[ing] the laws enacted by Congress." Dinh, 88 GEO. L.J. at 2092. Respect for the political branches counsels in favor of not placing a judicial thumb on the scales when interpreting the reach of an express preemption provision.

B. The presumption cannot be justified as a "tiebreaker" or as a clear statement rule.

Respondents reluctantly acknowledge that the "text of a statute obviously controls any express preemption inquiry," but insist that the presumption against preemption still has some role to play when the provision is "inconclusive" or open to other "plausible" meanings that do not result in a finding of preemption. HSUS BIO 29-30; see also State BIO 18 (presumption does not apply when preemption is "clear[]" or there is "no question * * * that preemption exist[s]"). Because, however, the Supremacy Clause of the Constitution points in *favor* of, not *against*, preemption, repackaging the presumption against preemption as a clear statement rule cannot be justified. Respondents therefore are mistaken when they suggest that courts should not give full effect to an express preemption provision absent "clear" or "conclusive" evidence of preemptive purpose or preemptive scope. Such a rule would mesh at best uneasily with the clear statement rules that the Court has applied in other contexts.

As Justice Scalia has explained, clear statement rules are designed principally "to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied. *Cipollone*,

505 U.S. at 546 (Scalia, J., concurring in the judgment in part and dissenting in part). Such clear statement rules ordinarily are applied to guarantee that Congress actually has focused on achieving a particular result that gives rise to constitutional concern.[11] But there is nothing extraordinary or concerning about express preemption, which is a routine consequence of the constitutional design.[12]

The presumption against preemption forces Congress to be *doubly* explicit about drafting legislation that potentially encroaches on traditional areas of state authority. According to the presumption's proponents, it is not enough that Congress be explicit about its *intent* to preempt—by assumption, the fact that Congress has enacted an express preemption provision does not suffice. Congress would be required to go still further, and anticipate every area of potential overlap between the federal and state regu-

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[11] *E.g.*, *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (Congress's intent to abrogate Eleventh Amendment sovereign immunity must be "unmistakably clear in the language of the statute") (internal quotation marks omitted).

[12] A presumption against preemption in the express preemption context would be conceptually incoherent in yet another respect: namely, it would have to coexist alongside the notion of *implied* preemption, under which federal laws can have preemptive effect even "[w]here Congress likely did not focus specifically on the matter." *Lohr*, 518 U.S. at 504 (Breyer, J., concurring). When implied preemption is at issue, Congress *by definition* has not clearly spoken to its intent to preempt, yet the Court remains willing to find preemption. Indeed, four members of the Court were willing to discard the preemption against preemption in the implied preemption context, which makes it especially odd to impose a clear statement rule when dealing with an express preemption provision. See *Mensing*, 131 S. Ct. at 2577-2578.

latory regimes. As Justice Scalia explained in a related context, "the result is extraordinary: The statute that says *anything* about pre-emption must say *everything*; and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power." *Cipollone*, 505 U.S. at 548 (Scalia, J., concurring in the judgment in part and dissenting in part).

Thus, a Congress intent on displacing state law would be left with one of two unpalatable options. Congress might try to enumerate and specifically target every conceivable state-law regime subject to preemption. But this would at most be a partial solution, since States would be emboldened to strategically re-characterize their law—*e.g.*, by calling a prohibition against the processing of non-ambulatory swine a regulation of the "kind of animal that may be slaughtered," cf. Pet. App. 9a—in order to wedge open a supposed gap in preemptive coverage, notwithstanding Congress's plainly expressed intent to preempt. See Nelson, 86 VA. L. REV. at 290-291. Or Congress might enact a deliberately over-inclusive preemption provision that sweeps so broadly as to deprive courts of the interpretative latitude to find any possible "ambiguity" or alternative "reading that disfavors pre-emption." Cf. *Bates*, 544 U.S. at 449. Neither outcome serves federalism.

The Constitution entrusts to the political branches the task of allocating regulatory authority between the States and the federal government. Especially in the express preemption context, constitutional principle and pragmatism align and call for the same result: forswearing further reliance on a presumption against preemption that can serve only to unnecessarily distort congressional intent.

III. The FMIA Preempts Section 599f Of The California Penal Code.

The court of appeals believed itself bound to apply the presumption against preemption, which likely contributed to its manifestly erroneous interpretation of the FMIA. Whether or not a presumption against preemption applies, it is plain that, in enacting the FMIA, Congress intended to preempt statutes like the one at issue here, which impose state-law requirements with respect to the operations of federally inspected slaughterhouses that are "in addition to, or different than" those established by federal law. We submit that this result can (and should) be reached more straightforwardly without the analytical underbrush of the presumption and, accordingly, that the Court should take this opportunity to clarify that the presumption has no application.

The appropriate function of the courts in this, as in any other, issue of statutory interpretation is to identify the "most plausible meaning" of a statute "using the traditional tools of statutory interpretation." *Bruesewitz*, 131 S. Ct. at 1082. When employed in the service of gaining a "fair understanding of congressional purpose" (*Lohr*, 518 U.S. at 485-86 (emphasis omitted)), those tools for divining congressional purpose point in a single direction: that the immediate euthanasia and disposal of non-ambulatory swine compelled under Section 599f is not required by federal law and thus is expressly preempted by the FMIA.

A. The plain meaning of the FMIA compels preemption of Section 599f.

The FMIA's express preemption provision provides that no State may impose "[1] [r]equirements

[2] within the scope of [the Act] with respect to premises, facilities and operations of any [federally inspected] establishment * * * , which are [3] in addition to, or different than those" established by the federal government. 21 U.S.C. § 678.

1. There can be no question that Section 599f imposes "requirements." An individual or company who engages in any of the conduct that it prohibits—*e.g.*, buying, selling or receiving a non-ambulatory animal; processing, butchering, or selling the meat of a non-ambulatory animal for human consumption; or holding a non-ambulatory animal without taking immediate action to humanely euthanize the animal—faces up to a year in prison and a $20,000 fine. Cal. Penal Code § 599f(a)-(c), (h). As this Court has recognized, the term "requirements" in the context of a preemption statute has a broad meaning. It includes any feature of state-law that has the effect of imposing a "legal duty" or "obligation" to take some action or refrain from others. See *Riegel*, 552 U.S. at 324; *Cipollone*, 505 U.S. at 522-523 (plurality opinion), 548-549 (Scalia, J., concurring in part and dissenting in part). It is difficult to imagine how a State could more effectively "govern[] conduct" (*Cipollone*, 505 U.S. at 521) than to criminalize it, as California has done here.

2. The next condition for preemption is that the requirements imposed by state law fall "within the scope of [the FMIA] with respect to * * * operations of any [federally inspected] establishment." 21 U.S.C. § 678. This condition is also plainly satisfied. The federal government has established a detailed and comprehensive regulatory scheme governing slaughterhouse "operations," including with respect to the humane handling of livestock, 21 U.S.C. § 603(b); 9

C.F.R. §§ 313.1-313.2;-ante-mortem and post-mortem inspections, 21 U.S.C. §§ 603(a), 604; 9 C.F.R. pts. 309, 311; and the slaughtering, processing, and butchering of carcasses passed for human consumption, 9 C.F.R. pts. 313, 318.

As soon as a delivery "vehicle carrying livestock enters an official slaughter establishment's premises, the vehicle is considered to be a part of that establishment's premises." FSIS Directive 6900.2, pt. I, § I.V.B (rev. 1, Nov. 25, 2003); see also FSIS Directive 6900.2, ch. II § I (rev. 2, Aug. 15, 2011).[13] It therefore comes within the physical scope of the FMIA and its implementing regulations. See 21 U.S.C. § 606(a) (extending authority of inspectors to "every part of * * * establishment"). Inspectors are authorized to enter delivery vehicles to, *inter alia*, "verify that the establishment is meeting humane handling requirements"—which extend to "[a]ll animals that are on the premises of the establishment," including "on vehicles that are on the premises"—and conduct antemortem inspections. FSIS Directive 6100.1 § VIII.A.1 (rev. 1, Apr. 16, 2009); FSIS Directive 6900.1, pt. 1, §§ III, VI.B (rev. 1, Nov. 2, 1998).

Importantly, federal law does *not* require the immediate euthanasia of non-ambulatory swine.[14] An intricate regulatory regime governs the handling and disposition of swine that are discovered to be (or

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[13] Revision 2 of FSIS Directive 6900.2 becomes effective September 15, 2011.

[14] Other non-ambulatory animals are subject to different requirements. For example, non-ambulatory cattle are categorically removed from the human food supply because of the risk of bovine spongiform encephalopathy (*i.e.*, "mad cow disease"). 9 C.F.R. § 309.3(e).

later become) non-ambulatory while on slaughterhouse premises. A non-ambulatory animal is one that "cannot rise from a recumbent position or that cannot walk" for any reason. 9 C.F.R. § 309.2(b). It is immediately identified as a "U.S. Suspect." *Id.* § 301.2. At all times, non-ambulatory swine (like all livestock) are subject to humane handling requirements. FSIS Directive 6900.2 (rev. 1), pt. I, § I.V.B; *id.* pt. III § A; see also FSIS Directive 6900.2 (rev. 2), ch. I, § VI; *id.* Attachment 2 § B.

Such animals are "subject to further examination by an inspector to determine" their ultimate disposition. 9 C.F.R. § 301.2. In the meantime, the non-ambulatory animals must be "separated from normal ambulatory animals" (*id.* § 313.2(d)(1)) and placed in a "covered pen sufficient, in the opinion of the inspector, to protect them from the adverse climatic conditions of the locale while awaiting disposition by the inspector" (*id.* § 313.1(c)). The federal inspector may clear the non-ambulatory swine for slaughter, post-mortem inspection, and further processing if ante-mortem inspection does not reveal that it is unsuitable for human consumption.[15] *Id.* §§ 309.2(b),

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[15] Once an animal has been identified as a U.S. Suspect, the slaughterhouse cannot unilaterally release or dispose of the animal. 9 C.F.R. § 309.2(p) ("When any animal identified as a U.S. Suspect is released for any purpose or reason, * * * * the operator of the official establishment or the owner of the animal shall first obtain permission for the removal of such animal from the local, State or Federal livestock sanitary official having jurisdiction."). The court of appeals downplayed this provision, hypothesizing that "there's no reason to suppose that federal officials wouldn't willingly give permission to euthanize downer animals." Pet. App. 12a n.5. *Mensing* makes clear the court of appeals' error: "The question * * * is whether the private party

311.1(a); see generally 21 U.S.C. §§ 604, 606(a); FSIS Directive 6100.1. But the ante-mortem inspection may also result in the non-ambulatory animal being classified as "U.S. Condemned," in which case it is euthanized and its carcass is removed from the premises. See 9 C.F.R. §§ 309.2-309.3, 309.13; *id.* pt. 314.

The ante-mortem observation and inspection of non-ambulatory animals (and other U.S. Suspects) play an important role in keeping the nation's food supply safe. Many signs of disease exhibit themselves only in live animals. *E.g.*, 9 C.F.R. § 309.3(c) (body temperatures). As the United States explains, a regime of systematic ante-mortem inspection "allow[s] inspectors to determine if the affected animals have a communicable disease that signals a threat to the larger swine population." U.S. Br. 5. Early detection of a communicable disease can enable segregation or quarantine of affected animals in time for such steps to be effective, as well as rapid notification of other potentially affected stakeholders. See 9 C.F.R. § 309.5, 309.15; FSIS Directive 6000.1 pts. VI-VII (rev. 1, Aug. 3, 2006).

Because Section 599f purports to dictate how federally inspected slaughterhouses must handle and dispose of non-ambulatory swine—matters that federal law addresses in considerable detail as explained *supra* (at 24-26) and in petitioner's brief at 30-33, 45-50—the requirements that it imposes fall "within the scope" of the FMIA and are "with respect to" slaughterhouse "operations."

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could *independently* do under federal law what state law requires of it." 131 S. Ct. at 2579 (emphasis added).

3. The final condition for preemption is satisfied because Section 599f imposes requirements that are "in addition to, or different than," those established by federal law. California law requires the immediate euthanasia of non-ambulatory swine and prohibits their further processing in the human food supply chain. Federal law does neither. It sets forth detailed procedures for receiving, handling, holding, observing, and inspecting non-ambulatory swine. And it contemplates that at least some non-ambulatory swine will, if cleared by federal inspector, eventually be passed for human consumption. Requiring immediate euthanasia and disposal of non-ambulatory swine (as California law does) is plainly "in addition to" and "different than" (21 U.S.C. § 678) establishing a system for the humane handling and inspection of non-ambulatory swine (as federal law does). It follows that Section 599f is preempted by the FMIA.

B. Even if the FMIA technically *permitted* what Section 599f now *requires*, Section 599f still would impose additional requirements, and so is preempted.

Respondents attempt to escape this conclusion in a variety of ways. But what practically all of them have in common is the unarticulated premise that the California statute is not preempted by the FMIA because state law ostensibly neither requires anything that federal law prohibits nor prohibits anything that federal law requires. For example, respondents assert that "federal regulations require inspection *if* downer animals are to be slaughtered, but the regulations do not require the slaughter of downer animals." State BIO 11; see also HSUS BIO 22. Along similar lines, respondents contend that there

are no "specific" or "affirmative" federal requirements specifying that slaughterhouses *must* receive non-ambulatory swine or that non-ambulatory swine *must* be presented for inspection. HSUS BIO 19, 22-23. Respondents thus submit that slaughterhouses could comply with state law by foreswearing any attempt to slaughter and process non-ambulatory swine for human food consumption.

As an initial matter, respondents' characterization of the federal regulatory scheme is incorrect. As the United States puts it, a slaughterhouse cannot "avoid all FSIS oversight by euthanizing a non-ambulatory animal and spiriting it away from federal inspector." U.S. Br. 23 n.7; see also Pet. Br. 47-48.

But even if respondents' characterization were accurate, it would not avail them in the slightest. Their arguments, at most, show that Section 599f is not subject to *conflict* or *impossibility* preemption (but cf. note 15 and *Mensing*, 131 S. Ct. at 2578-2579) and have no bearing on the applicability of the FMIA's *express* preemption provision. As this Court has explained, a state-law requirement survives the "different from" or "in addition to" standard only if it is "genuinely equivalent" to a pre-existing federal requirement. *Bates*, 544 U.S. at 447, 454; see also *Lohr*, 518 U.S. at 495 (state-law requirement must be "identical"). Even if the existing federal regulatory scheme simply *allowed* the course of conduct that is *required* under state law, the state-law requirements would be "in addition to the federal requirement and thus * * * preempted." *Bryant* v. *Medtronic, Inc.*, 623 F.3d 1200, 1205 (8th Cir. 2010) (internal quotation marks omitted); see also *Cupek* v. *Medtronic, Inc.*, 405 F.3d 421, 424-425 (6th Cir. 2005) (similar).

Thus, even assuming *arguendo* that federal law allowed slaughterhouses to independently or voluntarily "spirit[] * * * away" non-ambulatory swine from the federal inspection regime and thus avoid violating Section 599f's immediate-euthanasia-and-disposal requirement (cf. U.S. Br. 23 n.7), that still would not save the California statute from express preemption. Indulging that assumption, at most it could be said that federal law "permits, but does not require," a slaughterhouse to comply with state law. *McMullen* v. *Medtronic, Inc.*, 421 F.3d 482, 489 (7th Cir. 2005). But that would not change the fact that Section 599f imposes requirements that are not "genuinely equivalent" to those set forth by federal law. *Ibid.* There could hardly be a plainer example of a state-law attempt to impose requirements that are "in addition" to existing federal requirements.

Because the only interpretation of the FMIA's express preemption provision that is "supported by the text and structure of" the statute and regulatory scheme is one that embraces Section 599f of the California Penal Code, there is no need to resort to other "tools of statutory interpretation." *Bruesewitz*, 131 S. Ct. at 1082. Section 599f is expressly preempted by federal law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NATIONAL MEAT ASSOCIATION,
PETITIONER,
v.
KAMALA D. HARRIS, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE STATES OF ILLINOIS, ALASKA, ARIZONA, HAWAII, INDIANA, MICHIGAN, NEVADA, NEW YORK, OKLAHOMA, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

For States, this case has potential implications far beyond a narrow question of statutory interpretation. Petitioners and their amici have mounted an attack not only on the California law at issue here but also, more generally, against the "presumption against preemption," which requires Congress to speak clearly prior to interfering with States' authority to regulate conduct within their borders. States have a profound interest in this Court's continued adherence to its long-held presumption against preempting state law and, correspondingly, States' continued ability to exercise their police powers to regulate for the public health and safety.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its decision below, the Ninth Circuit began its analysis of the Federal Meat Inspection Act ("FMIA") with the longstanding presumption that, absent a clear statement to the contrary, Congress did not intend to supercede state law in an arena States have historically regulated. See Pet. App. 7a ("there's a strong presumption against preemption, especially when the state law deals with matters like health and animal welfare, which have historically been regulated by states"). Relying on this presumption against preemption, see Pet. App. 8a ("Consistent with the presumption against preemption, we must give [the FMIA preemption] provision a narrow interpretation."), the court below held that the FMIA does not expressly preempt a California law banning the receipt and

slaughter for human consumption of nonambulatory, "downer" animals at in-state slaughterhouses, including federally regulated slaughterhouses, see Pet. App. 8a-11a.

As the Ninth Circuit explained, the FMIA's preemption clause precludes "state regulation of the 'premises, facilities and operations' of slaughterhouses," Pet. App. 9a (quoting 21 U.S.C. § 678), "expressly limit[ing] states in their ability to govern meat inspection and labeling requirements," *ibid.* (internal quotations omitted). But the FMIA also "explicitly preserves for the states broad authority to regulate * * * 'other matters'" pertaining to slaughterhouses, Pet. App. 8a-9a (quoting 21 U.S.C. § 678). In particular, the FMIA "doesn't preclude states from banning the slaughter of certain kinds of animals altogether," decisions that "call[] for a host of practical, moral and public health judgments that go far beyond those made in the FMIA." Pet. App. 9a, 10a.*

Respondents' briefs explain in detail why the Ninth Circuit's decision rejecting federal preemption was correct, and the State amici will not duplicate these arguments. This brief focuses instead on the more broadly applicable aspect of the decision below—whether the Ninth Circuit properly invoked the presumption against preemption. For while petitioner

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* The Ninth Circuit also rejected petitioners' argument that the FMIA *impliedly* preempted California's ban on the receipt and slaughter of nonambulatory animals for human consumption. See Pet. App. 11a-15a. Petitioners do not challenge this holding.

suggests that this case may be resolved without resort to the presumption because Congress' intent to preempt is clear from the FMIA's "plain terms," Pet. Br. 53, this Court may conclude that the statute's wording alone does not resolve the preemption question, as even petitioner acknowledges elsewhere in its brief, see Pet. Br. 54-55 (recognizing possible "ambiguity" in FMIA requiring resort to legislative history).

In fact, the U.S. Chamber of Commerce, as an amicus supporting petitioner, devotes its brief to the argument that this Court should jettison the presumption against preemption in express preemption cases. See Brief of the Chamber of Commerce of the United States of America 10 ("Chamber Br.") (urging Court to "conclud[e] that the presumption against preemption has no application in the express preemption context"). Petitioner set the stage for the Chamber's argument by challenging the presumption's continued vitality in its questions presented. Pet. i-ii. This brief is the State amici's response to the attack on the Court's longstanding and recently reaffirmed reliance on the presumption against preemption even where, as here, the federal statute includes an express preemption clause.

At the outset, the Court's recent cases do not call the presumption's continued applicability in this context into question. Rather, the Court has consistently reaffirmed that the presumption is one of a class of interpretative canons (including the rule requiring an unambiguous statement of intent to abrogate state sovereign immunity and the doctrine of constitutional avoidance) requiring Congress to speak

clearly before upsetting the federal-state balance. Consistent with the Framers' vision, the presumption protects state sovereignty by forcing Congress to alert States that their interests are threatened, thereby allowing States to protect themselves through the democratic process. The existence of an express preemption clause does nothing to change that analysis, to the extent the clause is ambiguous either alone or where combined with "savings" language that protects areas of state action.

There is thus no reason for the Court to depart from its long-held presumption against the preemption of state law. And the Court should apply the presumption here, for animal welfare is an arena States traditionally have occupied, having regulated against animal cruelty longer and more comprehensively than the federal government.

ARGUMENT

1.a. For more than a half-century, the Court has applied a presumption against federal preemption of state law. The Court has explained:

> because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has "legislated * * * in a field which the States have traditionally occupied," * * * we "start with the assumption that the historic police powers of the States were not to be

> superseded by the Federal Act unless that was the clear and manifest purposes of Congress."

Medtronic v. Lohr, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (initial omission in original). Less than three years ago, in *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008), the Court reaffirmed the presumption's applicability where, as here, the federal statute includes an express preemption clause. See *id.* at 77 ("When addressing questions of express * * * pre-emption, we begin our analysis with the [presumption against preemption]") (internal quotations omitted).

b. To be sure, in cases decided since *Altria*, the Court has not always invoked the presumption when resolving issues of express preemption. Contrary to the Chamber's suggestion, however, see Chamber Br. 8-10, 15, the Court's silence in those cases does not cast doubt on the presumption's continued vitality. In *Cuomo v. Clearinghouse Association, LLC*, 129 S. Ct. 2710 (2009), "the plain terms of the [federal] Act" made it "unnecessary" for the Court to rely on the presumption in rejecting preemption, though the Court recognized "the incursion that the [federal] regulation ma[d]e upon traditional state powers." *Id.* at 2720. The presumption was equally unnecessary to resolve the express preemption question in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011), for the arguably preempted state law there fell within "the plain text" of the federal statute's savings clause. *Id.* at 1980. And as for *Bruesewitz v. Wyeth*, 131 S. Ct. 1068 (2011), on which the Chamber also relies, see Chamber Br. 9-10, "the only interpretation" that was "supported by the

text and structure" of the federal act in that case required preemption, *Bruesewitz*, 131 S. Ct. at 1081; accordingly, the presumption had no role to play.

Nor does *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), call the presumption into question. Although the four-Justice plurality suggested that "courts should not strain to find ways to reconcile federal law with seemingly conflicting state law" (at least on questions of implied conflict preemption, like the one presented there), *id.* at 2580, this suggestion failed to attract a majority; Justice Kennedy (who provided the fifth vote favoring federal preemption) did not join that portion of the plurality's opinion. And the four dissenting Justices would have held that the presumption applies "'[i]n all pre-emption cases, and particularly in those in which Congress has legislated * * * in a field which the States have traditionally occupied.'" *Id.* at 2586 (Sotomayor, *J.*, dissenting) (quoting *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009)) (brackets and omission in original).

2. Thus, there is nothing about the presumption requiring this Court's clarification, contrary to the argument in the certiorari petition. See Pet. 27-31. Although petitioner has since backed away from this suggestion (arguing in its merits brief that this case should be decided without considering the presumption's applicability, see Pet. Br. 52-54), the Chamber urges the Court to overturn its prior decisions recognizing and reaffirming the presumption. See Chamber Br. 8-22. The Court should decline this invitation. The presumption against preemption belongs to a class of interpretative rules that require legislatures to speak clearly when reaching disfavored

results. These canons of construction promote the rule of law and encourage political accountability. The Court should not abandon either these values or the presumption against preemption that advances them.

"'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). Such "clear statement" rules promote both compliance and the rule of law, by putting affected parties on notice of their obligations and limiting the enforcement discretion of government officials. These rules also foster careful legislative deliberation and reduce the risk that individual lawmakers will promote parochial interests. Finally, the rules encourage political accountability, offering parties an opportunity to express their objections through the democratic process and forcing legislators to pay a price for unpopular decisions. See generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 319-321 (2000). Consistent with these goals, the Court has not hesitated to require an unambiguous statement of legislative intent when Congress enacts laws that purport to affect the federal-state balance.

a. Thus, Congress must speak "expressly and unequivocally" when it abrogates the States' immunity to suit in federal court, *Sossamon v. Texas*, 131 S. Ct. 1651, 1661 (2011), or state court, see *Will*, 491 U.S. at 65. The Court refuses to assume without a clear

statement that Congress has "'alter[ed] the usual constitutional balance between the States and the Federal government,'" *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002) (quoting *Will*, 491 U.S. at 65), or interfered with the "'substantial sovereign powers'" the States retain "'under our constitutional scheme,'" *id.* at 544 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991)). This mandate "ensures that Congress has specifically considered state sovereign immunity and has intentionally legislated on the matter" and provides "notice to the States" of Congress' intended abrogation, affording States the opportunity to oppose abrogating legislation before it becomes law. *Sossamon*, 131 S. Ct. at 1661.

b. The doctrine of constitutional avoidance similarly requires Congress to provide the "clearest indication" of its intent "to infringe constitutionally protected liberties or usurp power constitutionally forbidden to it." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 577 (1988) (internal quotations omitted). And the Court has pressed this rule into service to protect state prerogatives. In *Jones v. United States*, 529 U.S. 848 (2000), for example, the Court construed the federal arson statute narrowly, so that it did not cover the arson of an owner-occupied private residence, "to avoid the constitutional question that would arise" under the Commerce Clause were the provision "read to make virtually every arson in the country a federal offense." *Id.* at 857-859. The Court explained that Congress would "not be deemed to have significantly changed the federal-state balance in the prosecution of crimes"

without a clear statement to that effect. *Id.* at 858 (internal quotations omitted); see also *Bass*, 404 U.S. at 349 (narrowly interpreting federal statute prohibiting felons from possessing firearms because, absent clear statement from Congress, Court "would not * * * assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction").

In short, the Court routinely applies clear statement rules and other interpretative canons to require Congress to deliberate carefully before legislating in the "traditionally sensitive area" of federal-state relations, and to give States fair notice of such legislation. These rules advance the interests at the core of our federalist system, and there is no more reason to abandon the presumption against preemption than any other rule requiring Congress to make its intent plain.

3. "'Dual sovereignty is a defining feature of our Nation's constitutional blueprint.'" *Sossamon*, 131 S. Ct. at 1657 (quoting *Fed'l Maritime Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 751 (2002)); accord *Printz v. United States*, 521 U.S. 898, 920 (1997) ("'our citizens * * * have two political capacities, one state and one federal, each protected from incursion by the other'") (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). By requiring Congress to speak clearly before displacing state law, the presumption against preemption preserves the "numerous advantages" of our "federalist structure," while honoring the limitations that the Supremacy Clause imposes on state authority. *Gregory*, 501 U.S. 458.

a. The presumption rests on "respect for the States as 'independent sovereigns in our federal system.'" *Wyeth*, 129 S. Ct. at 1195 n.3 (quoting *Lohr*, 518 U.S. at 485). In *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000), four Justices explained the presumption as follows: it "place[s] * * * the power of pre-emption squarely in the hands of Congress, which is" best "suited * * * to strike the appropriate state/federal balance." *Id.* at 907 (Stevens, *J.*, joined by Justices Souter, Thomas, and Ginsburg, dissenting). The presumption thus builds upon James Madison's prediction that Congress, because it is comprised of members from each State, would "'be disinclined to invade the rights of the individual States, or the prerogatives of their governments.'" *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 (1985) (quoting The Federalist, No. 46, p. 332 (B. Wright ed., 1961)). And the presumption "provides assurance that 'the federal-state balance' * * * will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Bass*, 404 U.S. at 349).

b. The presumption also guarantees the continued "effectiveness of the federal political process in preserving the States' interests." *Garcia*, 469 U.S. at 551. A clear statement of a bill's preemptive scope notifies States that their interests are threatened, thereby allowing States to protect themselves through the democratic process. States may voice their concerns to legislators in the run-up to a law's enactment, and legislators are subject to retribution from voters following the law's passage. This allows "the structural

safeguards inherent in the normal operation of the legislative process [to] operate to defend state interests from undue infringement." *Geier*, 529 U.S. at 907 (Stevens, *J.*, dissenting). "'[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'" *Gregory*, 501 U.S. at 464 (quoting L. Tribe, American Constitutional Law § 6-25, p. 480 (2d ed. 1988)) (brackets and emphasis in original).

In this respect, the expansion of Congress' powers under the Commerce Clause since the 1930s, which dramatically contracted the areas of exclusive state authority, makes the presumption all the more important. The Court developed the presumption at the same time that it gave Congress broader Commerce Clause authority, and the initial purpose of the presumption appears to have been to protect some measure of state authority in light of Congress' newly recognized powers. See Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 806 (1994). While congressional power under the Commerce Clause is not unlimited, see, *e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995), Congress now regulates virtually every sector of the American economy and myriad non-economic matters as well. States may retain a vibrant role as independent sovereigns only by convincing Congress to limit the preemptive force of federal law. But States have no opportunity to protect "the prerogatives of their governments" if the bill under consideration does not clearly preempt state law.

4. Because the presumption against preemption serves the same rule-of-law and political-accountability values as the Court's other sovereignty-protecting rules, the Chamber is wrong to suggest that the presumption "mesh[es] at best uneasily" with these rules. Chamber Br. 20-21 & n.11.

a. At the outset, the Chamber's view is impossible to reconcile with cases holding that the rule requiring a clear statement of congressional intent to abrogate state sovereign immunity "'applie[s] in other contexts,'" including to questions of federal preemption. *Gregory*, 501 U.S. at 460-461 (quoting *Will*, 491 U.S. at 65). As this Court has recognized, a federal statute purporting to preempt state law touches on "'traditionally sensitive areas'" and "'affect[s] the federal balance'" no less than federal abrogation of state immunity. *Id.* at 461 (quoting *Will*, 491 U.S. at 65). Similarly, although *Jones v. United States* was not formally a preemption case, Justice Stevens' concurring opinion (joined by Justice Thomas) "emphasize[d] the kinship between our well-established presumption against federal pre-emption of state law * * * and our reluctance to believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this." 529 U.S. at 859 (internal quotations and citations omitted).

b. Next, the Chamber turns federalism on its head, arguing that the Supremacy Clause "points in *favor* of, not *against*, preemption." Chamber Br. 20 (emphasis in original). This misses the point. There is no dispute that valid federal legislation has the power to trump state law, or that an express preemption clause shows

congressional intent to displace *some* state law. But when Congress fails to speak unambiguously in an express preemption clause, there is a question as to the scope of the law's intended preemptive effect, *i.e.*, over the extent to which Congress meant to "impose its will on the States." *Gregory*, 501 U.S. at 460. This is where the presumption comes into play. Because the authority to preempt state law "is an extraordinary power in a federalist system," "we must assume Congress does not exercise [it] lightly." *Ibid.*; accord *Wyeth*, 129 S. Ct. at 1205 (Thomas, *J.*, concurring in the judgment). The Chamber's view that "there is nothing extraordinary or concerning about express preemption," Chamber Br. 21, falls flat.

c. The Chamber also suggests that Congress is not up to the task of making its preemptive intent clear. See Chamber Br. 21-22 (expressing concern that "Congress would be required to * * * anticipate every area of potential overlap between the federal and state regulatory regimes"). But Congress is understood to account for traditional tools of statutory interpretation. This Court does not hesitate to "assume," for example, "that Congress legislates against the backdrop of the presumption against extraterritoriality," which requires a clear statement of congressional intent that a federal law apply beyond U.S. borders. *Arabian Am. Oil Co. v. EEOC*, 499 U.S. 244, 248 (1991). The Court can similarly assume that Congress knows well how to preempt state law. So, too, if a majority in Congress concludes that a court has underestimated the scope of its preemptive intent, Congress may respond with new legislation. See generally *John R. Sand & Gravel Co. v.*

United States, 552 U.S. 130, 139 (2008) ("*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done'") (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989)). It is then, when Congress makes the broader scope of its intended preemption clear, that States will have the chance to object by opposing the new legislation, rather than being blind-sided by an expansive construction of the original, ambiguous preemption language.

d. Nor is there anything to amici's suggestion that the very existence of implied preemption means there cannot be a live presumption against preemption. See Chamber Br. 21 n.12. To the extent that the implied preemption doctrine encourages courts to displace state law without any clear congressional intent to do so, the doctrine should be limited (or abandoned), as several of the Court's members have suggested. In *Whiting*, for example, the four-Justice plurality agreed that because "obstacle" preemption (a form of implied preemption) threatens to produce a "'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'" and "'undercut the principle that it is Congress rather than the courts that preempts state law,'" "'a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of the federal Act.'" 130 S. Ct. at 1985 (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110-111 (1992) (Kennedy, *J.*, concurring in part and concurring in the judgment)); see also *Wyeth*, 129 S. Ct. at 1217 (Thomas, *J.*, concurring in the judgment) (suggesting that obstacle preemption should be abandoned entirely).

And, in any event, an overly broad use of implied preemption is no reason to do away with the presumption against preemption.

5. Finally, there is no merit to the Chamber's claim that, whatever the presumption's role in implied preemption cases, it has no work to do when there is an express preemption clause. See Chamber Br. 12 (presumption should "'dissolve[]'" in face of express preemption provision). Of course, an express preemption provision *is* a clear statement of Congress' intent to preempt. But even when Congress includes an express preemption clause in a statute, the clause may be ambiguous or appear to be contradicted by broad "savings" language that protects areas of state action.

For example, the FMIA qualifies its preemption provision by explicitly preserving broad authority for States to regulate slaughterhouses. See 21 U.S.C. § 678 (States "not preclude[d] * * * from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter"). Similar statutory schemes—combining an express preemption clause with a savings provision—appear in a variety of laws addressing matters important to States, including their citizens' health and safety, see, *e.g.*, *Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131, 1135 (2011) (discussing National Traffic and Motor Vehicle Safety Act); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (addressing Federal Boat Safety Act); illegal immigration, see, *e.g.*, *Whiting*, 131 S. Ct. at 1977 (discussing Immigration Reform and Control Act); environmental protection, see, *e.g.*, *Bates v. Dow*

Agrosciences LLC, 544 U.S. 431, 439 (2005) (discussing Federal Insecticide, Fungicide, and Rodenticide Act); and benefits regulation, see *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 364 (2002) (discussing Employee Retirement Income Security Act (ERISA)).

Thus, the Court recognized that even when there is an express preemption provision, that "does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains." *Altria*, 555 U.S. at 76. Justice Scalia's assessment of ERISA's preemption clause provides a compelling example. That clause purports to preempt "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA. 29 U.S.C. § 1144(a). However,

> applying the "relate to" provision according to its terms [is] a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else. * * * The statutory text provides an illusory test, unless the Court is willing to decree a degree of pre-emption that no sensible person could have intended—which it is not.

Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 335-336 (1997) (Scalia, *J.*, concurring).

Because even an express preemption clause may not clearly indicate "the *scope* of [Congress'] intended invalidation of state law," this Court has rejected the Chamber's argument that the presumption "should apply only to the question whether Congress intended

any pre-emption at all." *Lohr*, 518 U.S. at 485 (emphasis in original). And this argument would prove too much, in any event. This Court has applied clear statement rules and other interpretative canons precisely where, as here, Congress has addressed an issue, but the scope of its legislation is unclear. See *supra* pp. 9-10; see also *Scheidler v. Nat'l Org. for Women*, 537 U.S. 393, 409 (2003) (under rule of lenity, courts may choose "harsher" of "two rational readings of a criminal statute" "only when Congress has spoken in clear and definite language'") (internal quotations omitted).

Nor, as the Chamber suggests, see Chamber Br. 10-11, does the presumption "conflict[]" with the requirement that the congressional purpose reflected in an express preemption clause's plain wording be the "'touchstone'" of any preemption inquiry. The presumption is triggered only "when the text of a pre-emption clause is susceptible of more than one plausible reading," *Altria*, 555 U.S. at 77, that is, when Congress has failed to make the scope of its preemptive intent clear. The Chamber's argument that the presumption "aggrandizes the judicial branch" at the expense of the legislative (purportedly by disfavoring preemption in the face of "concrete indicia" of Congress' intent), Chamber Br. 19, thus assumes its conclusion. The presumption is fully consistent with traditional interpretative tools.

6. Having established that the Court should reject the Chamber's invitation to jettison the presumption against preemption, the Court should apply the presumption here, assuming the Court concludes that

the FMIA's preemption clause is susceptible of more than one plausible construction. The presumption is "particularly" applicable to cases where "Congress has 'legislated * * * in a field which the States have traditionally occupied.'" *Lohr*, 518 U.S. at 485 (quoting *Rice*, 331 U.S. at 230) (omission in original); accord *Wyeth*, 129 S. Ct. at 1194-1195. This "approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Lohr*, 518 U.S. at 485. States have prohibited animal cruelty, including by requiring humane slaughter, longer and more comprehensively than the federal government. The protection of animal welfare thus is a prototypical illustration of "a field which the States have traditionally occupied."

States began legislating against animal cruelty long before Congress. In 1829, New York enacted legislation protecting animals from "malic[ious] kill[ing], maim[ing], or wound[ing]." N.Y. Rev. Stat. tit. 6, §26 (1829). Within a few decades of the New York law, States throughout the Midwest and Northeast followed suit with their own anti-cruelty provisions. See, *e.g.*, 1821 Me. Laws 5; Mass. Gen. Laws, ch. 96, §§ 1–2 (1859); Mich. Rev. Stat. ch. 8, § 22 (1838); N.H. Rev. Stat. ch. 219, § 12 (1843); Tenn. Code Ann. §§ 1668-1672 (1858); 1854 Vt. Acts & Resolves 51.1; see generally Randall Lockwood, Animal Cruelty Prosecution (Am. Prosecutors Research Inst. 2006) 5-8, available at http://www.ndaa.org/pdf/animal_cruelty_06.pdf (tracing history of animal cruelty laws in United States).

In contrast, no federal law governed the humane treatment of animals until 1873, nearly fifty years after the States began legislating in this area. See Twenty-Eight Hour Law, 49 U.S.C. § 80502 (1873) (amended 1994). And this first federal law was quite limited, protecting only livestock traveling across state lines during journeys lasting more than 28 hours. See *ibid.* The federal government did not get involved in legislating humane methods of slaughter until 1958, more than a century after States began passing their own anti-cruelty laws. See Humane Methods of Slaughter Act of 1958, 7 U.S.C. §§ 1901 *et seq*.

State animal cruelty regulation is also more comprehensive. Every State has anti-cruelty laws. See Anti-Cruelty: Related Statutes, Michigan State Univ. Coll. of Law: Animal Legal & Historical Ctr., available at http://www.animallaw.info/statutes/topicstatutes/sttoac.htm. In addition, 21 States have laws requiring the humane slaughter of animals. See Table of State Humane Slaughter Laws, Michigan State Univ. Coll. of Law: Animal Legal & Historical Ctr., available at http://www.animallaw.info/articles/ovusstatehumaneslaughtertable.htm (citing laws of Arizona, California, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and West Virginia). States with humane slaughter laws govern more than half of the livestock slaughtered in the United States today. See Livestock Slaughter 2010 Summary 11 (USDA Nat'l Agric. Statistics Serv. Apr. 2011), available at http://usda.mannlib.cornell.edu/usda/

nass/LiveSlauSu//2010s/2011/LiveSlauSu-04-25-2011.pdf.

States also have gone further than the federal government in regulating the kinds of animals that are suitable for human consumption, such as by prohibiting the slaughter of horses, cats, and dogs. See Cal. Penal Code §§ 598b-598c (West 2011); Del. Code. Ann. tit. 11, § 1325A (West 2011); Ga. Code Ann. § 26-2-160 (West 2011); 225 Ill. Comp. Stat. 635/1-1.5 (2010); Miss. Code Ann. §§ 75-33-3, 97-27-19 (West 2011); N.J. Stat. Ann. § 4:22-25.4 (West 2011); N.Y. Agric. & Mkts. Law §§ 96-d, 96-e (McKinney's 2011); Okla. Stat. Ann. tit. 63, §§1-1135-1139 (West 2011); Tex. Agric. Code Ann. § 149.001-007 (West 2011). In short, because the California law at issue is one of a long line of state laws protecting animals from inhumane treatment, including by banning the slaughter of certain types of animals altogether, this case is "particularly" well suited for application of the presumption against preemption.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 10-224

In The

Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,
Petitioner,

v.

KAMALA D. HARRIS, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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INTEREST OF *AMICI CURIAE*

Amici are professors of constitutional law, administrative law, and federal preemption. They are familiar with the issues in this case and knowledgeable about the federal preemption issues involved. [1]

Professor William Funk is the author of *American Constitutional Structure* and a co-author of one of the leading administrative law casebooks, *Administrative Procedure and Practice: Problems and Cases*. He has published numerous articles on administrative and constitutional issues, in publications including the Duke Law Journal, the Harvard Journal on Legislation, the Yale Journal on Regulation, the Administrative Law Review and the U.C.L.A Journal of Environmental Law and Policy.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amici curiae* state that all parties have consented to the filing of this brief; correspondence reflecting this consent has been filed with the Clerk of the Court.

Bending Science: How Special Interests Corrupt Public Health Research, *Workers at Risk* (co-author), *The Law of Environmental Protection* (co-author), and *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy*.

Professor Sandra Zellmer is the Alumni Professor of Natural Resources Law at the University of Nebraska College of Law. She is also a co-director of the University's *Water Resources Research Initiative*, an interdisciplinary educational and research effort. Her scholarly writings cover a range of topics, including preemption, water and public lands management, and wildlife and adaptive management, and have been published in journals including the Florida Law Review, Nebraska Law Review, and Houston Law Review, notably, *Preemption by Stealth*, 45 HOUSTON L. REV. 1569 (2009).

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress clearly acts to displace state law in matters of national concern, the courts should unquestionably give the federal action full effect. But, particularly in areas of traditional state regulation, the courts should not displace state law lightly. The Constitution models (and requires) this balance, giving substantial power to the federal government to act in certain contexts, while preserving the role of the States wherever possible, to establish our vibrant system of federalism.

One of the tools the Court has used to respect these constitutional boundaries is a "presumption against preemption." While some members of the Court have criticized a strong variant of the pre-

sumption against preemption, the entire Court has agreed on the "threshold description of the law of preemption . . . that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545 (1992) (Scalia, J., concurring in judgment in part and dissenting in part) (internal quotation marks and citations omitted). By approaching preemption questions with this assumption, the Court thereby gives effect to the text of the Supremacy Clause and the Constitution's federalist structure.

Following these principles, the Ninth Circuit properly determined that California Penal Code § 599f was not preempted by the Federal Meat Inspection Act (FMIA). In 2008, just months after a national scandal over issues associated with the slaughter of non-ambulatory livestock, the California Legislature enacted Assembly Bill 2098, a comprehensive prohibition on the sale, purchase, receipt, processing or butchering of livestock that are unable to walk without assistance. For ethical reasons, California's elected representatives concluded that "downed" animals should be excluded from becoming any part of the food production chain.

California's policy decision to exclude non-ambulatory animals from the meat production process is not preempted by the Federal Meat Inspection Act. As its name expressly suggests, the FMIA's primary concern is the meat inspection process and ensuring the quality of meat produced for human consumption and "used in commerce." 21 U.S.C. § 603(a). With respect to preemption, the relevant text of the FMIA contemplates three categories of state

law: state regulations regarding the "premises, facilities, and operations" of federally inspected slaughterhouses, which are expressly preempted, 21 U.S.C. § 678; state regulation regarding "any other matters regulated under this chapter," which are expressly saved from preemption, *id.*; and, of course, state laws outside the scope of the FMIA's statutory ambit, which are not displaced. Which animals a State chooses for ethical reasons to exclude from being slaughtered and processed into meat falls outside the federal government's interest in inspecting the animals that *will* be sold as meat for human consumption. And federal law does not require state law determinations as to what animals are suitable for slaughter to be left at the slaughterhouse gates.

In the FMIA, Congress expressed its intent to preempt state law under certain circumstances, while also explicitly preserving state authority in other circumstances, pursuant to a savings clause. The harmonious interaction between the FMIA and California's anti-cruelty statute reflects the proper federalist balance contemplated by the Constitution. The FMIA serves a national interest in ensuring that meat sold to American consumers is safe, and that animals that "are to be slaughtered" are treated in a manner consistent with that goal. 21 U.S.C. § 603. The representatives of the people of California enacted California Penal Code § 599f to declare that certain animals are *not* to be slaughtered in their State—namely, animals that are too sick, weak, or crippled to stand and walk on their own. Federal law leaves room for California to determine "that efforts to slaughter downed animals necessarily involve morally unacceptable risks of egregious inhumane treatment." Br. of Non-State Resp. at 15. *See gener-*

ally Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (noting that "[t]he first, and most axiomatic, advantage of decentralized government is that local laws can be adapted to local conditions and local tastes").

ARGUMENT

I. The Plain Language of the FMIA Demonstrates that California's Animal Welfare Law Falls Outside the Scope of the Act's Express Preemption Provision.

The Supremacy Clause of the U.S. Constitution provides that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, para. 2. The Court has applied the Supremacy Clause to preempt state laws that conflict with federal law. *E.g.*, *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 501 (1984) (explaining that federal preemption occurs "by direct operation of the Supremacy Clause"). This conflict can arise when Congress has expressly preempted state law by including such a statutory provision. However, even "[i]f a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008).

This Court has explained that "[w]hen a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'" *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1977 (2011) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) ("Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it.") (quoting *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment)). Similarly, a federal statute's savings clause should be applied on its terms, and not read narrowly without a textual basis. *Whiting*, 131 S. Ct. at 1980 ("Absent any textual basis, we are not inclined to limit so markedly the otherwise broad phrasing of the savings clause.").

A. The Scope of the FMIA Covers Only Animals Bound for Slaughter, Leaving States Free to Exclude Non-Ambulatory Animals from the Slaughtering Process.

Federal law expressly contemplates an active state role in regulating the meat industry, even as it more jealously guards the federal inspection process of animals bound for slaughter. California's prohibition on the slaughter of non-ambulatory animals is consistent, even supportive, of the balance struck by federal law, since it deals with which animals may be slaughtered and sold as meat, as opposed to how animals bound for slaughter should be inspected. Indeed, interpreting the FMIA to require displacement of California's determination that non-

ambulatory animals are excluded for ethical reasons from the slaughtering process would upset the federal-state balance contemplated by the FMIA, turning preemption principles on their head.

NMA's challenge to Section 599f is based on the FMIA's express preemption provision, which states:

> Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State . . .

21 U.S.C. § 678.

But at the same time this provision expressly preempts any efforts by the States to alter the federal inspection process of animals bound for slaughter, it also explicitly provides that "[t]his chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter." *Id.* This savings clause makes clear that Congress contemplated that the States will continue to play some role, even in terms of "matters regulated under this chapter." *Id.* *See generally* Sandra B. Zellmer, *Preemption by Stealth*, 45 HOUSTON L. REV. 1659, 1661 (2009) ("Both savings clauses and preemption clauses serve to demarcate the boundaries of federal and state law, but unlike preemption clauses, savings clauses strike the bal-

ance in favor of states and state law remedies."). There is certainly nothing in the FMIA's text and structure to suggest displacement of the States' role in ethical and moral matters *not* regulated by the Act.

A fair reading of these provisions demonstrates that California's law excluding certain animals from slaughter does not expressly conflict with federal law governing the inspection of animals that are bound for slaughter. Preserving the domain of the States to determine which animals may be slaughtered is fully consistent with the federal-state balance struck by the FMIA.

The FMIA could not be more clear that its target is animals bound for slaughter and that its purpose is to ensure the quality of meat produced for human consumption—it simply does not govern animals not bound for slaughter that are not intended to be processed into meat. To begin, the title of the chapter in the U.S. Code governing these questions is "Meat Inspection," 21 U.S.C.A. Ch. 12, not "Animal Inspection." The very first words of the congressional statement of findings are "[m]eat and meat food products," and the clear motivating purpose of the law is to protect "the health and welfare of consumers . . . by assuring that *meat and meat food products* distributed to them are wholesome, not adulterated." 21 U.S.C. § 602 (emphasis added). The title of the subsection covering inspection is "Examination of animals *before slaughtering*; diseased animals *slaughtered* separately." 21 U.S.C. § 603(a) (emphasis added). It requires "an examination and inspection of all amenable species before they shall be allowed to enter into any slaughtering, packing, meat-

canning, rendering, or similar establishment, *in which they are to be slaughtered* and the *meat and meat food products* thereof are to be used in commerce." *Id.* (emphasis added). It also makes clear that the inspection requirements are "[f]or the purpose of preventing the use in commerce of *meat and meat food products* which are adulterated." *Id.* (emphasis added). In short, the scope of the FMIA covers animals bound for slaughter that are intended to be processed into meat for human consumption. The FMIA does not restrict or preempt California's decision to exclude non-ambulatory animals from slaughter altogether (requiring that they, instead, be humanely euthanized and not processed into meat).

NMA's arguments to the contrary are a bridge too far, demonstrating that its disagreement with California law is rooted in policy disagreement rather than any legitimate concern over federal supremacy. NMA argues that once an animal passes through the slaughterhouse gates, what happens to that animal is solely determined by federal law, state law notwithstanding. Pet. Br. at 45-46. So although California can exclude a non-ambulatory animal from entering a federally-inspected slaughterhouse, under NMA's view, once that animal crosses the threshold, it matters not whether California law prohibits the slaughter of non-ambulatory animals, since "[n]either the Act, nor [Food Safety and Inspection Services] regulations or directives, prohibits the receipt of nonambulatory swine." Pet. Br. at 46.

But what if a horse were somehow mistakenly included in a vehicle carrying swine? Although California law prohibits the slaughter of horses, Cal.

Penal Code § 598c, nothing in federal law prohibits either the receipt or slaughter of horses. It is unclear how NMA's reasoning should lead to a different result for a horse than it would for a non-ambulatory animal. Under NMA's view, both the errant horse and the non-ambulatory pig should be inspected and slaughtered absent a federal rule to the contrary, no matter what state law says. But this reasoning is fundamentally flawed. Federal law does not require state law determinations of what animals may be slaughtered to be left at the slaughterhouse gates. There are no federal requirements that *any* animal be slaughtered; federal law only governs *how* animals bound for slaughter must be treated and inspected. California's moral choice to exclude from slaughter animals too weak or sick to walk to their own death should be given the same respect as California's moral decision to exclude horses from slaughter.

NMA's arguments relating to the inspection of non-ambulatory animals also reach too far. Petitioner's attack on California's prohibition against "hold[ing] a nonambulatory animal without taking immediate action to humanely euthanize the animal," Cal. Penal Code § 599f(c), as being fundamentally incompatible with the FMIA's antemortem inspection requirements for non-ambulatory animals misunderstands the nature of these requirements. First, these inspection requirements are primarily in place to filter out non-ambulatory animals whose meat should not enter into the food supply, a goal not hindered by California's requirement for immediate, humane euthanization of non-ambulatory animals.

Second, while the federal inspection requirements certainly have some value added in helping to identify communicable disease, even the federal agency responsible for inspections, the Food Safety and Inspection Services (FSIS), acknowledges that immediate, humane euthanization does not necessarily conflict with these subsidiary purposes. FSIS's "Slaughter Inspection 101" "Fact Sheet" clarifies that "[i]f an animal goes down or shows signs of illness . . . the establishment must immediately notify the FSIS veterinarian to make a case-by-case disposition of the animal's condition. *Alternatively*, the establishment *may humanely euthanize* the animal." 9 C.F.R. § 309.1 (emphasis added). These instructions are consistent with federal regulations, which only *require* inspection of "livestock offered for slaughter." 9 C.F.R. § 309.1(a). By the plain text of the statute, federal law simply does not require inspection of animals *not* bound for slaughter.

The language Congress used in the FMIA's preemption provision—preempting state laws with respect to premises, facilities, and operations—"require[s] a careful comparison between the allegedly pre-empting federal requirement and the allegedly pre-empted state requirement to determine whether they fall within the intended pre-emptive scope of the statute." *Medtronic*, 518 U.S. at 500. Had Congress wanted to preempt the vast swathe of state law that NMA suggests—basically anything connected to slaughterhouses—it could have done so. As it is, the broad reading NMA seeks to give to the FMIA's preemption clause would essentially render the Act's savings clause a nullity. This would make no sense. *See Whiting*, 131 S. Ct. at 1981 ("Given that Congress

specifically preserved such authority for the States, it stand to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority.") If anything, the specificity of the FMIA's express preemption clause—limiting it to regulations with respect to the "premises, facilities and operations" of federally inspected slaughterhouses—and the broadness of the savings clause—expressly preserving state authority to regulate "other matters" covered by the Act, as well, as, obviously, all matters *not* covered by the Act—counsels restraint in interpreting the text of the preemption clause. No strict "presumption against preemption" is necessary to reach this statutory construction. It is simply the only common-sense reading of the plain language of the federal law.

B. The Court Should Not Use General Policy Concerns Not Expressed in the Text and Structure of the FMIA to Preempt California Penal Code Section 599f.

The vague policy concerns and anxieties expressed by the NMA and the United States as *amicus curiae* are not only baseless, *see* Br. for Non-State Resp. at 52-59, but also threaten to untether the Court's preemption analysis from its foundations.

First, implied preemption arguments based on nothing more than federal "balancing" of conflicting policies are particularly unpersuasive in contexts that do not "involve uniquely federal areas of regulation." *Whiting*, 131 S. Ct. at 1983. Animal welfare and humane handling laws have traditionally been matters of state concern. *See United States v. Ste-*

vens, 130 S. Ct. 1577, 1583 (2010). The primary goal of Section 599f was to prevent cruelty to non-ambulatory animals. Kathleen Ragan, *Bill Analysis: Paul Krekorian Statement to the California State Assembly Committee on Public Safety in Support of A.B. 2098* at 3 (Apr. 1, 2008), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2051-2100/ab_2098_cfa_20080328_144343_asm_comm.html. Congress enacted the FMIA to "prevent[] the use in commerce of meat and meat food products which are adulterated." 21 U.S.C. § 603(a). This purpose is not offended by a state law such as § 599f, which removes a class of animals from food production entirely. To read the law to preclude § 599f would reach far beyond the plain language of the FMIA in order to preempt far more than Congress intended.

Second, it is inappropriate to read into legislation a desire for uniformity when the text and structure of the Act reflect the desire to allow some degree of policy diversity among the States. The broadly worded savings clause of the FMIA reflects Congress's comfort with some degree of heterogeneity in state regulations regarding "other matters" covered by the Act. Where Congress has "expressly preserved the ability of the States to impose their own sanctions . . . that—like our federal system in general—necessarily entails the prospect of some departure from homogeneity." *Whiting*, 131 S. Ct. at 1979-80. *See also* Zellmer, 45 HOUSTON L. REV. at 1662-63 (arguing that savings clauses enhance the "congressional objective of cooperative federalism").

Finally, vague policy arguments in support of preemption are of little use when state actions do not

"directly interfere[] with the operation of the federal program." *Whiting*, 131 S. Ct. at 1983. In the FMIA, "[a]s with any piece of legislation, Congress did indeed seek to strike a balance among a variety of interests . . . . [p]art of that balance, however, involved allocating authority between the Federal Government and the States." *Id.* at 1984. The policy arguments advanced by NMA and the United States ask the Court to venture into the sort of "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" that this Court has explained "would undercut the principle that it is Congress rather than the courts that preempts state law." *Gade*, 505 U.S. at 111 (1992) (Kennedy, J., concurring in part and concurring in judgment).

A doctrine that substitutes "policies" for "laws" in Article VI's Supremacy Clause—and thereby authorizes judicial displacement of State laws on that basis—is inconsistent with basic principles of deliberation and democratic accountability expressed in Article I and Article III. Although courts have established means of discerning the meaning of laws, there is no similarly reliable method of determining the "policies" of a statute. *See Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J. concurring in judgment) ("It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions. And likewise dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor"); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326 (2008) ("It is not our job to speculate upon congressional motives."). Because many federal

statutes can be said to embody "countless policies," *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646 (1990), it would be particularly inappropriate to allow a judicial search for ambiguous congressional purposes to trump the longstanding laws of the sovereign States. *See Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (declining "'to give the state-displacing weight of federal law to mere congressional *ambiguity*'") (quoting Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-25, 480 (2d ed. 1988)); Kenneth Starr, et al., THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE, 36 (ABA 1991) (criticizing the "purpose inquiry" in preemption cases because "a complex of competing legislative policies can be undermined").

In *Bates v. Dow Agrosciences*, Justice Thomas (joined by Justice Scalia) approvingly noted the "Court's increasing reluctance to expand federal statutes beyond their terms through doctrines of implied pre-emption." 544 U.S. 431, 459 (2005) (Thomas, J., concurring in the judgment in part and dissenting in part), explaining that preemption analysis should be limited to "inquiry into whether the ordinary meanings of state and federal law conflict.'" *Id.* (quoting *Gade*, 505 U.S. at 110 (Kennedy, J. concurring)). Stretching the terms of the FMIA's preemption provision to the extent required by NMA's argument threatens state sovereignty and our federalist system. *See Medtronic*, 518 U.S. at 488 (rejecting "sweeping interpretation" of preemption clause in part because it would "produc[e] a serious intrusion into state sovereignty").

II. The FMIA Preserves Important State Regulatory Authority, Reflecting the Constitution's Careful Balancing of Federal-State Power.

Particularly in areas of traditional state regulation, the courts should not displace state law lightly. The Constitution contains a carefully crafted balance of federal-state power, giving substantial power to the federal government to act in certain contexts while preserving the role of the States wherever possible, to establish our vibrant system of federalism. As this Court has long recognized, the enumeration of powers in Article I, reinforced by the Tenth Amendment, make clear the intent to preserve the authority of States, thereby "assur[ing] a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; increas[ing] opportunity for citizen involvement in democratic processes; [and] allow[ing] for more innovation and experimentation in government." *Gregory*, 501 U.S. at 458. *See generally* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 538-39 (1995) (arguing that "federalism needs to be reconceptualized as being primarily about *empowering* varying levels of government and much less about limiting government," and advocating that preemption doctrine be applied "so as to maximize the ability of state and local governments to act").

The Supremacy Clause is a key part of the Constitution's careful balance of federal-state authority. Far from authorizing preemption of state law in the name of every federal policy or purpose, Article VI allows displacement of state law only by enacted federal *law*, which requires express agreement among

two houses and two democratically-elected branches of government. *See* U.S. CONST. art. I, § 7; *INS v. Chadha*, 462 U.S. 919, 951 (1983) (finding that courts may not give effect to law that did not follow the "single, finely wrought and exhaustively considered, procedures" specified in the Constitution); *see also Thompson*, 484 U.S. at 191 (Scalia, J., concurring in the judgment) ("An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed."); *Bowsher v. Synar*, 478 U.S. 714, 757-759 (1986) (Stevens, J., concurring in the judgment) ("when Congress legislates, when it makes binding policy, it must follow the procedures prescribed in Article I").

The constitutionally-mandated lawmaking process not only ensures that important decisions are made deliberately and democratically, but it also contains special federalism safeguards. In particular, the provision of equal State representation in the Senate in Article I, § 3, represents "a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty." THE FEDERALIST No. 62, 408 (James Madison) (B. Wright ed., 1961); *accord* THE FEDERALIST, *supra*, No. 43, 315 (James Madison); *see also Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 551 (1985) ("The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent."). To permit displacement of state law by judicially imputed policies is to deny the States their main

"protect[ion] from [federal] overreaching" and circumvent "the principal means chosen by the framers to ensure the role of the States in the federal system." *Garcia*, 469 U.S. at 550-51 & n.11 (citing, *inter alia*, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)); *see also id.* at 556 ("the built-in restraints that our system provides through state participation in federal governmental action . . . . ensure[] that laws that unduly burden the States will not be promulgated."); *see generally* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1328-36 (2001).

Accordingly, regardless of whether a specific "presumption against preemption" is applied to an express preemption provision or not, the courts must be careful to ensure that state law is only preempted by federal "law," U.S. Const. art. VI—that is, only when it is clear that Congress has displaced state law through its constitutional lawmaking power. *See generally* William Funk, *Judicial Deference and Regulatory Preemption by Federal Agencies*, 84 TULANE L. REV. 1233, 1254 (2010) (explaining that the "presumption against preemption" is justified by "respect for the concepts of federalism and the fact that only if Congress does exercise its constitutional powers can it preempt state law").

Some members of the Court have criticized the "presumption against preemption," and argue against its application in express preemption cases, in particular. *E.g.*, *Bates*, 544 U.S. at 457 (Thomas, J., concurring in judgment in part and dissenting in

part); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 544-45 (1992) (Scalia, J., concurring in judgment in part and dissenting in part). This criticism is echoed by Petitioner and its *amici*. *E.g.*, Pet. Br. at 52; Br. of Chamber of Commerce as *Amicus Curiae*. But the entire Court has agreed on the "threshold description of the law of pre-emption . . . that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone*, 505 U.S. at 545 (Scalia, J., concurring in judgment in part and dissenting in part) (internal quotation marks and citations omitted). *Cf. Wyeth v. Levine*, 555 U.S. 555 (2009) ("In all pre-emption cases and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (citations omitted). To the extent the Ninth Circuit in this case applied any sort of presumption, it was simply to read the FMIA against this backdrop of traditional state authority. The circuit court's reading of the statute's express preemption and savings provisions and California's anti-cruelty law did not involve the sort of "distort[ion] [of] federal law to accommodate conflicting state law," *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2580 (2011) (plurality op.), that the presumption's critics decry.

Starting from the assumption that the States retain their traditional regulatory power is a pragmatic way to respect the constitutional boundaries set out in our federalist structure and the Supremacy

Clause's textual requirement that only federal "law" shall displace state regulation. *See* Funk, 84 TULANE L. REV. at 1254 (observing that the presumption against preemption serves a practical purpose in helping to interpret preemption provisions and serves to protect federalism). Here, the FMIA's express preemption provision rebuts any "presumption against preemption" with respect to whether Congress intended to preempt at least *some* state law; however, with respect to the *scope* of the preemption provision, Congress must still be clear if it wants to displace traditional state authority. *See Medtronic*, 518 U.S. at 484-85. This is especially true in the case of a statute, such as the FMIA, in which Congress has expressed its intent to preempt state law under certain circumstances while also explicitly preserving state authority in other circumstances, pursuant to a savings clause.

In this case, the FMIA and California Penal Code § 599f are not in conflict, as discussed in detail in Section I. To the contrary, the State's anti-cruelty statute reflects the Constitution's federalist balance. The FMIA serves a national interest in ensuring that meat sold to American consumers is safe, and that animals that "*are to be* slaughtered" are treated in a manner consistent with that federal interest. 21 U.S.C. § 603 (emphasis added). But the federal law leaves room for the people of California to decide for moral reasons that certain animals are *not* to be slaughtered in their State—namely, animals that are too sick, weak, or crippled to stand and walk on their own. The federal interest in only having safe, wholesome meat on the market is preserved, while California is free to exercise its prerogative to enact

"local laws . . . adapted to local conditions and local tastes." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987).

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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October 11, 2011

AMICUS CURIAE BRIEF

No. 10-224

IN THE
Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,
Petitioner,

v.

KAMALA D. HARRIS, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE PUBLIC CITIZEN, AARP, CENTER FOR RESPONSIBLE LENDING, CONSUMER FEDERATION OF AMERICA, NATIONAL CONSUMER LAW CENTER, AND PUBLIC HEALTH LAW CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are consumer advocacy groups and a legal technical assistance organization interested in the protection of public health and welfare through both state and federal law. Amici are concerned about the increasing invocation of federal preemption by a variety of industries to avoid state health and safety regulation and to cut off consumers' access to the civil justice system. Therefore, amici have a strong interest in the proper application of the interpretive principles that govern cases involving claims of preemption. This case implicates one of those principles—the presumption against preemption. Although the presumption does not often determine the answer to the question whether state law is preempted, it can be an important tool for preserving public protections and respecting the appropriate role of state law in our federalist system.

Public Citizen is a nonprofit organization devoted to research, advocacy, and education on a wide range of public-health and consumer-safety issues, with more than 250,000 members and supporters nationwide. Founded in 1971, Public Citizen has a longstanding interest in fighting exaggerated claims of federal preemption of state health and safety laws, and its lawyers have represented parties in many significant federal preemption cases, including *Williamson v. Mazda*, 131 S. Ct. 1131 (2011), *Warner-*

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[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici curiae made any monetary contribution to this brief's preparation or submission. The parties' letters of consent to the filing of this amicus brief have been filed with the clerk.

Lambert v. Kent, 552 U.S. 440 (2008) (mem.), *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), and *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

AARP is a nonpartisan, nonprofit organization dedicated to representing the needs and interest of people age 50 or older. As the largest organization in the United States dedicated to addressing the needs and interests of older Americans, AARP is concerned about ensuring strong protections against unfair and deceptive practices in the marketplace that target vulnerable populations, such as older individuals who are disproportionately victimized by many of these practices. AARP believes that state consumer-protection laws play a critical role in protecting consumers and the proper application of the long-standing presumption against preemption is necessary to protect consumers' interests.

Center for Responsible Lending (CRL) is a nonprofit policy, advocacy, and research organization dedicated to exposing and eliminating abusive practices in the market for consumer financial services and to ensuring that consumers may benefit from the full range of consumer-protection laws designed to inhibit unfair and deceptive practices by banks and other financial services providers. CRL has been extensively involved in the debate over preemption of state consumer-protection laws by national banks. CRL regularly testifies before Congress on preemption and consumer-credit issues, and was the principal author of amicus briefs in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), and *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009).

Consumer Federation of America (CFA) is a nonprofit association of nearly 300 nonprofit organizations, including consumer, senior citizen, low-income, labor, farm, public power, and cooperative organizations. Founded in 1968 to

advance the consumers' interest through advocacy and education, CFA represents consumer interests before federal and state regulatory and legislative agencies, participates in court proceedings as amicus curiae, and conducts research and public education. CFA, in its work on numerous consumer issues ranging from financial and tobacco regulation, to auto, food and product safety, has urged that federal laws provide a floor and not a ceiling to consumer protections.

The National Consumer Law Center (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969 at Boston College School of Law, NCLC has been a resource center addressing issues such as illicit contract terms and charges, home improvement frauds, debt collection abuses, and fuel assistance benefit programs. NCLC publishes an 18-volume Consumer Credit and Sales Legal Practice Series, served on the Federal Reserve System Consumer-Industry Advisory Committee and committees of the National Conference of Commissioners on Uniform State Laws, and acted as the Federal Trade Commission's designated consumer representative in promulgating important consumer-protection regulations.

The Public Health Law Center is a nonprofit public interest legal center located at the William Mitchell College of Law in Saint Paul, Minnesota. The Center is dedicated to helping local, state, and national leaders improve public health by strengthening law. The Center serves as the National Coordinating Center for the Network for Public Health Law, which offers legal technical assistance to health departments nationwide. The Center also houses the Preemption and Movement Building in

'ublic Health Project. The Center frequently supports tate and local governments in responding to legal chal- enges based on preemption, and provides education and esources about preemption and the role of local authority n promoting public health policy development.

SUMMARY OF ARGUMENT

This Court's decisions have repeatedly emphasized that [i]n all pre-emption cases, and particularly in those in vhich Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that vas the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This "presumption against preemption" has informed many of the Court's decisions concerning both express and implied preemption. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1195 n.3 (2009) (citing cases).

The use of presumptions as tools to resolve ambiguity n statutory language is well established in the Court's jurisprudence. Where the scope of express preemption is unclear, such a tool is necessary, has a constitutional basis, and is consistent with the Court's approach to resolving ambiguities in other contexts.

In considering whether the Federal Meat Inspection Act (FMIA) expressly preempts California Penal Code § 599f, the court below properly acknowledged the presumption against federal preemption of state law. Pet. App. 8a, 9a. The opinion does not state that the presumption affected the court's conclusion that federal law does not expressly preempt § 599f. Even so, if this Court finds the scope of the FMIA's preemption provision ambiguous

in this case, it should apply the presumption against preemption and affirm the decision below.

ARGUMENT

THE PRESUMPTION AGAINST PREEMPTION IS A NECESSARY AND APPROPRIATE TOOL FOR RESOLVING AMBIGUITIES IN EXPRESS PREEMPTION PROVISIONS.

This Court's cases stating a presumption against preemption go back more than a century. *See, e.g., Reid v. Colorado*, 187 U.S. 137, 148 (1902) (Harlan, J.) ("It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested.") (citing *Sinnot v. Davenport*, 63 U.S. 227, 243 (1859)); *Napier v. Atl. Coast Line R. Co.*, 272 U.S. 605, 611 (1926) ("The intention of Congress to exclude states from exerting their police power must be clearly manifested."); *Allen-Bradley Local No. 1111, United Elec., Radio & Mach. Workers of Am. v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (citing cases); *Rice*, 331 U.S. at 230 ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."); *see also Cohens v. Virginia*, 19 U.S. 264, 443 (1821) ("To interfere with the penal laws of a State . . . is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and

the intention would be clearly and unequivocally expressed.").

The Court has repeatedly held that the presumption applies to cases construing the scope of express preemption provisions. *See, e.g.*, *Altria Group v. Good*, 555 U.S. 70, 77 (2009); *Bates v. Dow AgroSciences, LLC*, 544 U.S. 431, 449 (2005); *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 432-33 (2002); *Medtronic*, 518 U.S. at 485; *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992); *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 678-79 (1993) (Thomas, J., concurring in part and dissenting in part) (criticizing majority's partial preemption holding for broad reading of term "subject matter" in express preemption provision because "'historic police powers of the States' to regulate train safety must not 'be superseded . . . unless that [is] the clear and manifest purpose of Congress.'").

In each of these cases, the question was not *whether* the plain language of a federal statute preempted state law to some extent. Rather, the parties agreed that the language of the statute manifested Congress's intent to override state law, and the dispute was over the scope of the preemption. In such circumstances, the presumption against preemption serves as an important tool of statutory construction, providing a principled way for the courts to resolve questions about ambiguous statutory language.

A. The federal courts' basic approach to statutory construction is well established: Courts resolve questions of statutory interpretation, first, by looking "to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."

Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). The courts have developed various tools to aid in this task, such as ejusdem generis, expressio unius est exclusio alterius, and noscitur a sociis, which aim to assist in ascribing a definite meaning to the words used by Congress to express its intent. "If a court, employing [these] traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, USA v. Natural Res. Defense Council*, 467 U.S. 837, 843 n.9 (1984); *see, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

It is hardly controversial to say, however, that the traditional tools for analyzing text are often inadequate to ascertain the meaning of statutory language. In recognition of this fact, the Court has developed additional tools to be employed when the meaning of a statutory provision is ambiguous. The tools employed depend on the context in which the question arises.

For example, when faced with an ambiguity in a criminal statute, the courts apply a "rule of lenity," under which ambiguous criminal laws are "interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008). In the usual case (as in the Court's express preemption cases), it is undisputed that Congress addressed the particular topic at issue in some fashion, but the intended scope of the law is not clear. For example, in *Santos*, there was no dispute that the statute criminalized activities involving "proceeds" of unlawful activity. *Id.* at 510-11. The question was the meaning of "proceeds"—specifically, whether "proceeds" included receipts or only profits. Applying the presumption embodied in the rule of lenity, the Court plurality chose the narrower reading of the statutory term. *Id.* at 514

("Because the 'profits' definition of 'proceeds' is always more defendant-friendly than the 'receipts' definition, the rule of lenity dictates that it should be adopted.").

Several presumptions used to construe ambiguous statutory language derive from the Court's concern with trenching too broadly on the exercise of state powers, even where the federal government's power to do so is unquestioned. For example, the Court has held that the Eleventh Amendment immunizes the states from suit in federal court. *Edelman v. Jordan*, 415 U.S. 651 (1974). Although Congress may override that judgment pursuant to its legislative powers under the Fourteenth Amendment, *see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court has insisted that Congress do so in unmistakably clear terms. *See, e.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-46 (1985). Accordingly, where the question arises whether a statute abrogates the states' immunity, the Court's "plain-statement rule" holds that any ambiguity is resolved in favor of the states.

Even where Eleventh Amendment sovereign immunity is not at issue, the Court has held that principles of federalism give rise to a similar rule of statutory construction when the question is whether Congress intended to exercise its Fourteenth Amendment powers to impose enforceable obligations on the states. "Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority," the Court has held that it "should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981). "The rule of statutory construction invoked in *Pennhurst* was, like all rules of statutory construction, a

tool with which to divine the meaning of otherwise ambiguous statutory intent." *EEOC v. Wyoming*, 460 U.S. 226, 244 n.18 (1983).

Again, in construing the applicability to the states of statutes enacted pursuant to Congress's authority under the Commerce Clause, the Court has adopted a plain-statement rule. *See Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). As the Court explained, "[i]n the face of [an] ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions." *Id.* Notably, in *Gregory*, there was no question that Congress intended to extend the coverage of the statute involved (the Age Discrimination in Employment Act (ADEA)) to the states—the ADEA plainly applies to some state employees. *Id.* at 467. Rather, as in many such cases, the question was the scope of the statute's application to the states, and specifically in *Gregory*, whether state judges were among the state employees covered by the ADEA. *Id.* at 464-65.

Similarly, the Court has held that, when legislating pursuant to its spending power, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17 ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."); *see Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *see also Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 781 (2000) (presumption that "person" does not include the states).

In addition, the Court has developed tools to resolve ambiguities in statutory language in a variety of other circumstances. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (stating "longstanding rule requiring a clear state-

ment of congressional intent to repeal habeas jurisdiction"); *United States v. Mead Corp.*, 533 U.S. 218, 227, 229 (2001) (deference to agency's reasonable interpretation of ambiguous statutory provision it is charged with implementing); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) ("strong presumption" in favor of judicial review of final agency action); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *cf. Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (noting common-law rule that ambiguous contract language should be construed against drafting party).

B. Like these other established doctrines, the presumption against preemption provides a principled way to resolve ambiguities in statutory language. And like the plain-statement rule recognized in the Eleventh Amendment, Fourteenth Amendment, and Commerce Clause contexts, the presumption derives from the federalist system at the heart of our constitutional structure. *See Gregory*, 501 U.S. at 461. As the Court stated in *Medtronic*, "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." 518 U.S. at 485; *see Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (finding no preemption of state law and observing that "the structure and limitations of federalism . . . allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons'") (quoting *Medtronic*, 518 U.S. at 475) (some internal quotation marks omitted). The

presumption against preemption "provides assurance that the 'federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

Like the plain-statement rule, the presumption against preemption helps to ensure that, "although the courts will still have to struggle with statutory language, they will be working with an anchor holding them to Congress' preemptive intent." Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 Hastings Const. L.Q. 69, 113 (1988) (footnote omitted). That is, the "presumption, if consistently applied, . . . shift[s] authority for making preemption decisions from the courts to Congress." Thomas Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 728 (2008); *see* Bradford Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1425 (2001) (presumption against preemption "safeguard[s] federalism by ensuring compliance with federal lawmaking procedures" and "ensure[s] that courts do not displace state law in the name of a command Congress did not actually enact into law").

Also like the plain-statement rule, the presumption facilitates the proper division of functions between the legislative branch and the judicial branch by requiring Congress to define precisely the areas of law in which it intends to oust state authority. "[R]equiring that Congress speak clearly will help ensure that its decision to preempt is the product of a deliberate policy choice[.]" Betsy Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. Rev. 559, 627 (1997); *see* Wolfson, 16 Hastings Const. L.Q. at 113 (presumption "requir[es] Congress to deal honestly in settling the expectations of those who are subject to regulation").

In fact, in *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), the Court explicitly invoked *Gregory*'s plain-statement requirement in support of its holding that a provision of the Federal Communications Act did not expressly preempt a Missouri statute:

> Hence the need to invoke our working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires.

Id. at 140; *see id.* at 141 (Scalia, J., joined by Thomas, J., concurring in the judgment) (also invoking *Gregory*'s "clear statement" requirement). Other opinions also correlate the presumption against preemption with a plain-statement rule. *See Gonzales v. Oregon*, 546 U.S. at 291 (Scalia, J., joined by Roberts, C.J., and Thomas, J., dissenting) (referring to "clear-statement rule based on the presumption against pre-emption"); *Cipollone*, 505 U.S. at 533 & n.1 (Blackmun, J., joined by Kennedy, J., and Souter, J.) (concurring in part, concurring in the judgment in part, and dissenting in part) (comparing rule that "[w]e do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language" to Eleventh Amendment plain-statement rule).

Moreover, Congress has known for more than a century that a presumption against preemption will be applied where the scope of statutory preemption is ambiguous, if the topic at issue is one within the states' traditional areas of concern. Thus, applying the presumption is consistent with the background understanding of Congress as it has legislated over many years. *See Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 206 (1991) ("When the

issue to be resolved is one of statutory construction, of congressional intent to impose monetary liability on the States, the requirement of a clear statement by Congress to impose such liability creates a rule that ought to be of assistance to the Congress and the courts in drafting and interpreting legislation."); *cf. AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 397 (1999) (affording *Chevron* deference to agency interpretation and noting that "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency").

C. Petitioner NMA does not take issue with the presumption against preemption as a general matter, but questions its applicability here. In contrast, its amicus Chamber of Commerce broadly argues that the Court should disavow the long-stated presumption. Primarily, the Chamber asserts that a presumption makes no sense in the context of express preemption because, there, Congress has explicitly stated an intent to preempt. This argument misses the point.

Here, as on most disputes about express preemption, the parties agree that a federal statute preempts state law to some extent. The question is not *whether* it preempts, but *what* it preempts. *See* Pet. App. 8a-9a. In such cases, the presumption comes into play in determining the effect of the express preemption provision on the state law at issue—for example, whether a state law "relates to" a covered employee benefit plan within the scope of ERISA's express preemption provision, 29 U.S.C. § 1144(a), or, in this case, whether activity addressed in a particular state law falls within the scope of the term "operations" in the FMIA's preemption provision, 21 U.S.C. § 678. The Chamber (at 12-13) argues that a presumption is not needed to discern the scope of express preemption provisions, but it fails to identify another tool of statutory

construction to replace it when plain meaning does not suffice to resolve a case.

The Chamber is correct that the presumption is not always needed, but only in the sense that the Court in many cases sees no ambiguity in the application of a preemption provision to the case before it. *See, e.g., Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1978-79 (2011) (finding scope of provision clear); *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2720 (2009) (presumption against preemption not invoked where "unnecessary to do so in giving force to the plain terms of the [statute]").

On the other hand, like any statutory provision, an express preemption provision may be ambiguous in its scope or meaning. *See, e.g., Cal. Div. of Labor Standards Enforcement v. Dillingham Const.*, 519 U.S. 316, 325 (1997); *N.Y. State Conference of Blue Cross & Blue Shield Plans*, 514 U.S. at 655; *Cipollone*, 505 U.S. at 518. When faced with such a provision, it is no answer to say that the preemption question is, "by constitutional design, to be *answered by Congress*." Chamber Br. 19 (emphasis in original, citation omitted). Congress has already spoken, and the question facing the court is what Congress's words mean or how they apply to the circumstances before the court. In such a case, as the Court has recognized, "extrinsic aids to construction" may be used "to solve . . . an ambiguity." *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83 (1932), *cited in Chamber of Commerce v. Whiting*, 131 S. Ct. at 1980.

To be sure, if this Court construes an express preemption provision differently than Congress intended, Congress can then amend the provision to speak more clearly. *See* Grey, 77 B.U.L. Rev. at 627. But that is as true when the Court gives a narrow construction as when it gives a broad one. Faced with an ambiguity, the courts must make

a choice, and the presumption against preemption is a tool to ensure that the choice is made on a basis that is consistent with the principles underlying our federalist system and with other judicial tools of statutory construction. These concerns dictate that the courts should err on the side of requiring Congress to make the choice to preempt, rather than requiring Congress to correct an overbroad preemption ruling by the courts.

While generally arguing that the Court needs no tool to resolve ambiguity, the Chamber (at 20) eventually suggests that the Supremacy Clause weighs *in favor* of preemption. This suggestion runs directly counter to this Court's jurisprudence. As the Court has noted, the power granted by the Supremacy Clause to preempt state law is "an extraordinary power in a federalist system," and one that the Court "must assume that Congress does not exercise lightly." *Gregory*, 501 U.S. at 460. Although the Supremacy Clause allows federal law to override state law, the Chamber is wrong to say that the Supremacy Clause exhibits a preference for preemption. The Clause provides that state law must yield to federal law when the two conflict or when federal law expressly preempts state law, but it nowhere expresses a preference for federal laws that conflict with and preempt state law. And it cannot credibly be read to support the Chamber's suggestion that express preemption provisions should be broadly construed.

The discussion in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2579-80 (2011), of the Supremacy Clause as a "non obstante" provision is not to the contrary. In *PLIVA*, four Justices took the view that the Supremacy Clause "suggests that federal law should be understood to impliedly repeal conflicting state law." *Id.* at 2580. Thus, they stated, the Clause indicates that courts "need look no further than the 'ordinary meaning' of federal law, and

should not 'distort the new law to accommodate the old.'" *Id.* (brackets omitted). Whether or not this view of the Supremacy Clause is correct, it does not require the conclusion that a presumption against preemption should not apply in situations where the "ordinary meaning" of statutory language is ambiguous. In such a case, as here, the issue is not whether to "distort" the federal statute to accommodate state law. Rather, the issue is whether to adopt one of two possible readings of statutory language.

Furthermore, even accepting the "non obstante" view of the Supremacy Clause, the presumption against preemption has a strong foundation in the constitutional design.

> The Supremacy Clause is an indispensable feature of our federal system, but so is the concept of enumerated, limited sources of federal power with residual power lying in the states. . . . A presumption against a broad reading of federal law that purports to preempt state law expressly . . . serves a different function. Like other "clear statement" rules it operates to ensure that the federal political process has focused upon the displacement of state authority before it acts to do so. Without such a rule there is no assurance that in fact Congress has attended to the consequences of displacing state authority.

Calvin Massey, *Federalism and the Rehnquist Court*, 53 Hastings L.J. 431, 511-12 (2002) (responding to Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 293-98 (2000)). Indeed, if the Supremacy Clause provided the only constitutional principle relevant to construing the scope of federal laws that displace state authority, the clear-statement principle of *Gregory* would be baseless.

D. In this case, the question presented turns on the meaning of the term "operations" in the FMIA. The court below held that California Penal Code § 599f does not address the operations of slaughterhouses; it addresses the types of meat that may be sold for human consumption. The court noted the presumption against presumption, but its analysis started and ended with "the language of the statute," which it found unambiguous. Pet. App. 9a ("Starting, as we should, with the language of the statute, we find no express preemption."). Thus, the presumption may not be needed to resolve this case. Nonetheless, to the extent that the Court finds ambiguity in the scope of the FMIA's express preemption provision, the presumption supports a narrow reading and affirmance of the conclusion that the FMIA does not expressly preempt § 599f.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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